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and Land Down. with the
C A S E *St. Louis*

OF

PETER FINNERTY,

INCLUDING

A FULL REPORT OF ALL THE PROCEEDINGS

WHICH TOOK PLACE

In the Court of King's Bench

*Upon the Subject; and of which but an imperfect Sketch has
appeared in the Newspapers, with Notes and a Preface.*

COMPREHENDING

AN ESSAY UPON THE LAW OF LIBEL,

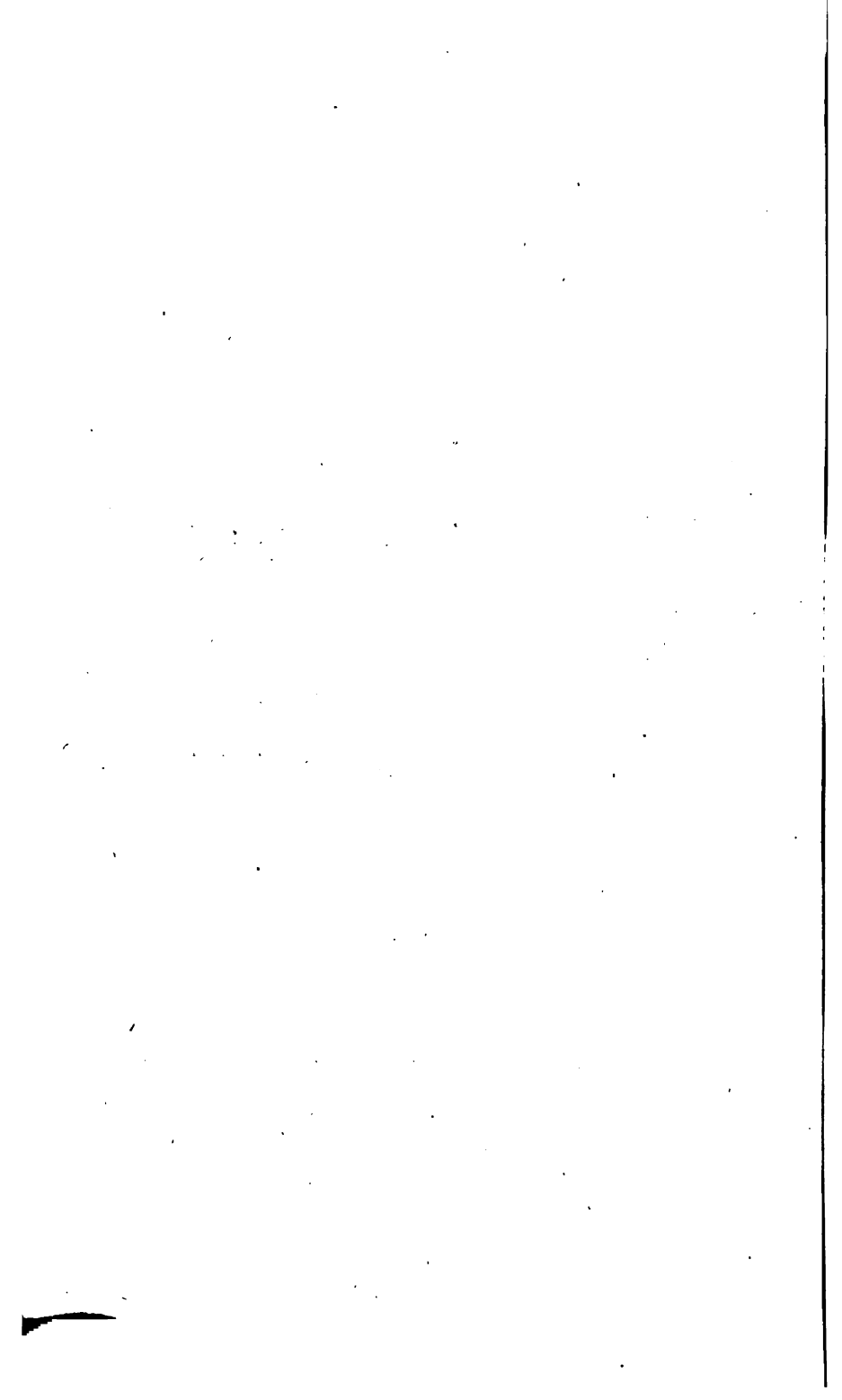
AND

**SOME REMARKS UPON MR. FINNERTY'S CASE; TO WHICH
IS ANNEXED, AN ABSTRACT OF THE CASE OF COLO-
NEL DRAPER, UPON WHICH PRECEDENT
MR. FINNERTY PROFESSED TO ACT**

LONDON:

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1811.



P R E F A C E.

ANY transaction which serves to illustrate the character of the law of libel, must be interesting to the public; and, therefore, the following pages appear to deserve their attention. In using the phrase of "*law of libel*," I rather adopt the language of the courts than that which precision would warrant; for I do not think that this *thing* can be comprehended under any description or definition of law to be found on record, either from lexicographer or lawyer, from poet or historian. "*Law*," says Blackstone, "in its general and most comprehensive sense, signifies a *rule of action*—it is that rule of action which is *prescribed* by some superior, and which the inferior is bound to obey."—Law, is thus defined by Johnson—"a decree, edict, statute, or custom, *publicly established* as a *rule of justice*;"* "*a decree*, authoritatively annexing rewards or punishments to *certain actions*,† an established and constant mode of process—a *fixed* correspondence of cause and effect,"‡ a distinct edict or rule.§ Now, there being no "*rule*," no "*decree*," nothing "*prescribed*, established, certain, constant, distinct, or fixed," upon this subject, I cannot conceive how the thing itself can be accurately described. So uncertain and indefinite does it appear, that I know not any other description that can apply to it but that of Mr. Finnerty, namely, that "the will of the judge is the law of the land." And how must this be regretted when one considers how

* *Milton, Davies.* † *Milton, Hooker.* ‡ *Hooker, Shakspeare.*

§ *Baker.* The great lexicographer, states other definitions, which are equally inapplicable to this law of libel.

much that will is liable to vary, and how many are subject to the visitation of its power—that in fact every man in the empire is within its reach. How much this law is liable to vary, or rather how much it has actually varied, may be ascertained by consulting the numerous and contradictory *dicta* of judges upon the subject—their difference not merely as to the application of principles, but as to principles themselves; not merely as to the exposition of the law, but as to the essence of the law itself. Chief Justice Scroggs laid it down, that no writer was at liberty even to praise the government without its permission. Justice Allynbone maintained the doctrine of the late Bishop of Rochester, that the people had no right to interfere with the concerns of government—had nothing to do but to obey its authority—and that any writer who presumed to meddle with the conduct of government at all was criminal. This opinion of Allynbone, in the case of the seven Bishops, was opposed by Justice Powell, who maintained that truth was not a libel; and the great Lord Camden has said that Powell was the only honest man upon the bench at that time. Lord Holt maintained the same doctrine as Powell. But I cannot find a single judge, from Lord Coke down to Lord Ellenborough, who is consistent in the definition of what is a libel, or who affords any clue whatever by which a writer may securely direct his course. Lord Coke,* who appears to have been the parent of this anomaly, states, in his case *de libellis famosis*, that it is totally immaterial whether a libel be true or false. Yet the same Coke maintained quite the contrary in the case of *Lake v. Hatton*.† Holt's opinion in the case of *Tutchin* is at variance with his opinion in the case of *Fuller*. So does Lord Mansfield's opinion, in the case of *Mr. Tooke*, differ from that

* How peculiarly applicable to this man and to other great names whom one often hears quoted, particularly among the lawyers, is the following observation of Beccaria:—"The legislators, or rather lawyers, whose opinions when alive were interested and venal, but which after their death become of decisive authority."

† In Coke 3 Inst. p. 174. The falsehood of the libel in the case of the King v. John de Northampton, is stated to form the ground of the judgment—"quæ litera continet in se nullam veritatem."

in the case of Woodfall. Then as to my Lord Ellenborough : look to his opinion in the case of Mr. Perry, who was prosecuted for stating that the Prince of Wales, when he ascended the throne, would have a greater opportunity of becoming nobly popular than any of his predecessors since the revolution, and simply by acting upon a different system from that pursued by his father. There Lord Ellenborough laid it down, that no writer was criminal for recommending even a total change of system. But is it possible efficiently to urge such a change without giving pain to the feelings of those who subsist by the existing system? You cannot, in fact, enforce the bond without drawing blood. And how does this square with the learned lord's doctrine in another case? namely, that to give pain to the feelings of any man is a libel.* The learned lord, however, sanctioned the writing against an entire system of government, because, as he observed, any finite being is liable to error;† which maxim his lordship, no doubt, bears in mind, when he reads any commentaries applied to himself. But Sir Vicary Gibbs differed from his lordship upon this broad and just doctrine. Sir Vicary maintained, that the publication for which Mr. Perry was prosecuted was most gross and seditious; that it had, in fact, a tendency to excite a wish for the death of the King. Here, then, Lord Ellenborough and Sir Vicary Gibbs were at issue. The jury concurred with the learned lord; and, therefore, his doctrine was held to be correct. But if a writer, acting upon the *dictum* of Lord Ellenborough, should be hereafter indicted for a libel, (and there is no limitation as to time,) he might be brought to trial after the learned lord should resign or cease to exist; and when, perhaps, Sir Vicary Gibbs, or some lawyer of his opinion, might succeed him,‡ what

* See the case of the King v. Johnson.

† This, extraordinary as it may seem, is a great concession; for there is a case in the books, of a barrister having been prosecuted for libel, for presuming to apply to a public officer the reflection of *humanum est errare* (it is the lot of man to err).—See the case of the King v. H. Blandford.—But there are still more absurd prosecutions on record: and such prosecutions may again take place, as the law stands.

‡ If the resignation or death of the learned lord should occur

is to become of the writer who trusts to Lord Ellenborough's law.* Amidst such glaring absurdity, how can any English subject so regulate his conduct as to escape the visitation of this extraordinary law. In Lord Ellenborough's late charge upon Mr. Cobbett's trial, the learned lord professed a disposition to tolerate such latitude of discussion in any writer as might urge the legislature to act upon his opinion. But again, how is it possible for a writer to avail himself of this toleration without offence to the feelings of those attached to, or perhaps subsisting upon the system he deprecates? A writer cannot be efficient if he escapes giving offence. How, for instance, is it possible for any one to argue with such force and effect as to urge the legislature to abolish sinecures or reversions, without giving pain to Mr. Perceval and Lord Arden? particularly if he offer one of the strongest arguments against such sinecures and reversions; namely, the manner in which they are disposed of—or to put an end to the corruption of elections, without giving pain to hundreds of men in power? Therefore the latitude of discussion which one doctrine

under the government of the present ministers, no one is more likely to succeed his lordship than Sir Vicary himself.

* The law of the learned lord in this case is in itself at variance with the following authority: "It hath been held that words, though not scandalous in themselves, yet if published in writing, and tending in any degree to the discredit of a man, are libellous, whether such words defame private persons only, or persons employed in a public capacity; in which latter case they are said to receive an aggravation, as they tend to scandalize the government, by reflecting upon those who are intrusted with the administration of public affairs, which doth not only endanger the public peace, as all other libels do, by stirring up the parties immediately concerned in it to acts of revenge, but also have a direct tendency to breed in the people a dislike of their governors, and incline them to faction and sedition. (*Bacon's Abridgment*, p. 491. *Hawkins's Pleas of the Crown*, 194. b. i. chap. 73. sect. 7.)—Now this doctrine is directly in the teeth of Lord Ellenborough's law; for it is impossible to recommend a total change of system in any government, without being obnoxious to the censure of this doctrine. Hawkins is a great authority; and the question is, whether his *dictum* may not have as much weight with posterity as that of Lord Ellenborough? and whether, following the opinion of the latter, may not expose a writer to punishment under the authority of the former. Is not the very idea of such uncertainty in any law unjust and preposterous?

PREFACE.

v

of the learned lord's would tolerate, is quite incompatible with the limits which another doctrine would prescribe.

The clearest way of appreciating this law of libel is, I should think, to consider its consistency with some acknowledged general principles—with those maxims which are uniformly asserted to form the ground-work of the British constitution. *First*, then, it is laid down that “to be free, is to live under a government by law;” *second*, “where there is no law there is no transgression;” *third*, “no human law can be just that is not agreeable to the law of God;” *fourth*, “guilt consists in the intention;” *fifth*, “let the laws be clear, and simple, and certain;” *sixth*, “ignorance of the law is no excuse;” *seventh*, “judges in criminal cases have no right to interpret the penal laws, because they are not legislators;” *eighth*, “it is better to prevent crimes than to punish them;” *ninth*, “the laws are equal to all men;” *tenth*, “punishments should be proportioned to crimes.” Now, to which of these principles or maxims does what is called the law of libel conform? or is it conformable to any of them? As to the first maxim, what would a foreigner, or what should a native think of our free government, when assured that there is no fixed law whatever upon this subject of libel?—that the will of the judge upon the trial of each particular case is the only law known in England—that by this law the judges exercise a power not merely *jus dicere*, which is the limit of the judicial authority prescribed by the constitution, but *jus dare*, which is quite opposite to that constitution—the power not merely of explaining, but of dictating the law; by which they combine the legislative and judicial functions; and such a combination is obviously inconsistent not only with the constitution of England, but with that of any rationally constructed government in the world. This, however, is not the only grievance. In an arbitrary government, where the will of the government is the law of the land, that will is somehow previously promulgated, and by conforming to its precept, the subject, who thus learns what he is called upon to obey, may escape punishment. But in this anomaly, called the law of libel, those who are subject to its operation have no pre-

vious knowledge whatever of what they are to obey, for the will of the judge is only promulgated through the medium of punishment; every such punishment being in fact liable to all the exceptions that apply to an *ex post facto* law. Now the existence of such a power as this on the part of the judges is the more to be wondered at in a country where it is an acknowledged principle that the king himself is under the law.* In fact, the power exercised by the judges in this case is greater than can consistently belong to any set of men in a free state. It really serves to constitute them as a sort of *imperium in imperio*. From what I have observed as to the first maxim, it will be seen that the second is quite inapplicable to the law of libel. As to the third maxim, how can that law be deemed compatible with divine precept, which declares that truth, the highest emanation, the first attribute of the Divinity, shall be punished as a crime. "Strange," said Swift, "that a man should be called upon to answer for that in a court of justice for which he will never be called upon to answer in heaven."—Strange, says common equity, that a man should be punished for that in the former, for which he will be rewarded in the latter. But in fact, the assertion of a right to enforce that which, according to religion and morality is wrong, must be despised as nonsense, or detested as blasphemy. With respect to the fourth maxim, the natural presumption is, that no one intentionally writes a libel. Indeed it is absurd to suppose such intention in any but a maniac, and a maniac is not a fit subject for punishment. When a man writes a libel, it must therefore proceed from his ignorance of the law; and this naturally leads to a consideration of the fifth maxim, that the law should be clear and intelligible. Is it necessary to ask any rational man whether this maxim be answered by the law of libel—by that which is quite unintelligible, which is perpetually varying?—then should a man be punished for his ignorance of such a law? "I do not know," says Beccaria, "of any exception to this general axiom, that *every member of society should know when he is criminal and when he is*

* See the declaration of Coke to James I, upon the authority of Bracton and Fleta.

innocent." "Would you prevent crimes," says the same great authority, "let the laws be clear and simple—let the entire force of the nation be united in their defence—let them be intended rather to favour every individual than any particular classes of men—*let the laws be feared, and the laws only.* This fear of the laws is salutary, but the fear of man is a fruitful and fatal source of crimes." Now, will the law of libel stand the test of any one of these rules? No—a writer who feels any fear is afraid, not of the law, for he does not know what it is, but of the judge that is to try and pronounce sentence upon him. The sixth maxim is evidently inapplicable to the law of libel; for surely it is excusable to be ignorant of that which nobody knows. By the seventh maxim we are told, that judges are not to interpret penal laws, because they are not legislators. But in this law of libel, the judges are, as I observed before, both judges and legislators. In order to conform to the eighth maxim, it would surely be necessary, with a view to prevent libelling, that some distinct law should be enacted upon the subject. Common justice and humanity call for such an act. Men should not be left in a state of total ignorance as to what they are to obey, and still liable to be punished for disobedience. If such a law be not enacted, I declare that I would prefer the re-enactment of the licensing act, from the same consideration that Voltaire, when he observed that the French were slaves and they knew it, while the English were slaves and they knew it not, decided in favour of the state and prospects of the former. Besides, a writer would then know at once what he could safely publish; while every writer now publishes at his peril, and many under considerable anxiety of mind, even after consulting the most eminent lawyers; for no lawyer can afford a writer the least guidance upon the subject.* The only guidance, in fact, which writers

* In fact, when licences were established, a writer could obtain permission to publish for a less fee than is now frequently given to a lawyer for the revision of a work, and still that work is published at the author's peril. It were better, then, for authors, that licensing should be renewed—better, far better, notwithstanding Milton's opinion, that a man's production should be stifled at the moment of its birth, than admitted into the world, and reared into public notice, for the purpose of being destroyed with its parent.

have, who animadvert upon either principles or persons, does not refer to law, but to the probability of prosecution—not to the question, whether they violate the law or not, but whether the principles to which their animadversions apply are those of which men in power are peculiarly tenacious, or whether the persons to whom their animadversions apply are such as are likely to prosecute for libel. Of course from this review it will be readily felt, that it is safe to deprecate the principles favoured by the opposition, and to abuse the individuals by whom those principles are supported. Men of liberal sentiments, of known attachment to the liberty of the press, it is calculated may be assailed with impunity. It is known, for instance, that such a man as Sir Francis Burdett will not indict for a libel. Hence those wretches who subsist by slander—who scorn the restraints of truth or decency—who pervert their capacity to a worse purpose than even Nero perverted his power, continue to pelt their abuse at this pure and excellent man. Hence every man is abused by such miscreants who is not supposed likely to prosecute—hence every man, for whom the attorney-general or the minister feels no solicitude, is exposed to abuse—hence the Prince of Wales, Lords Moira and Folkstone, and Mr. Whitbread, are abused—hence those who censure good men walk at large, and enjoy impunity, nay profit, by their system of calumny; while those who censure bad men are condemned to a jail: so that there is no security for a writer against prosecution for libel, but in calumniating the good—a license against liberty, which the worst governments are the most ready to allow. Now as to the ninth maxim, it is the peculiar boast of the advocates of the British constitution, that the laws are equal to all men: let us measure the law of libel by this standard. The introduction of foreign soldiers into this country has been publicly deprecated by some of the most distinguished men we have known, from the establishment of the present family upon the throne, and particularly since the days of Lord Chatham. Yet, for writing in that strain, nay, for censuring the employment of such soldiers in the flogging of our own people, Mr. Cobbett is now in Newgate. Since the days of Chatham also, nothing has been more commonly repeated than the remark

of that great man, that there was "something behind the throne greater than the throne itself." Yet, for echoing this remark in a Sunday paper, a poor man of the name of Beaumont is now suffering under a sentence of two years' imprisonment. If it be observed, that Lord Chatham had the privilege of parliament, which entitled his lordship to say that for which the other was legally punishable; then, I would ask, how can it be justifiable to publish the debates in parliament at all, if for the repetition of what is said in either house an Englishman is liable to be sent to jail. Why should an appeal be made to the public understanding, if any member of the public shall be punished for a response? Why should attempts be made or tolerated to excite the people to a free expression of their sentiments, while such freedom of expression is penal? But as to Lord Castlereagh—he has been repeatedly censured in both houses of parliament. Mr. Whitbread and others have accused this lord of having sanctioned torture in Ireland; and yet this accusation formed the ground-work of the noble lord's complaint, that Mr. Finnelly's libel had a tendency to bring his character into scandal and disgrace. Now Mr. Fox, in a discussion upon the slave trade, described the noble lord as a fit successor for Mr. Dundas upon the Treasury Bench, from his peculiar facility in producing a strong assertion for the support of his party when there was a lack of argument; adding, that he would take care the noble lord should never be included in any administration of which he formed a part. Mr. Foster in the House of Commons charged, and offered to prove, the practice of corruption, under the auspices of the noble lord, in order to carry the Union. The noble lord himself confessed in the House of Commons that he had endeavoured to do an act which the Speaker said *our ancestors would have startled at the mere mention of*. Mr. Canning and all the ministers, including Lord Camden (his own uncle) agreed to turn the noble lord out of the cabinet as an unworthy colleague. In what estimation Lord Castlereagh's character is universally held—in what terms it is universally spoken of, it is unnecessary to mention: * yet

* Castlereagh was acquitted about the seat-selling in the House of Commons; upon the alledged ground that the practice was common.

Mr. Finnerty is a prisoner in Lincoln jail, and Mr. Jones in Cold-bath fields, for "*devising and intending to BRING the character of the noble lord into scandal and disgrace*" by their writings. But the most notable instance of the application of this maxim, as to the equality of all men in the eye of the law, appears in a recent case. Blackstone and Sir Samuel Romilly have written strongly, very strongly and laudably indeed, against the severity of punishment prescribed by the penal laws; which apply only to a very small and to the very worst part of the community. Neither of these lawyers have ever been prosecuted. Yet the editor of the Examiner and the editor of the Stamford News have been subjected to prosecution for deprecating a punishment which applies to one-fourth of the effective, and, in the present crisis, the most valuable part of our population. The editor of the Examiner was found innocent at Westminster; but the Editor of the Stamford News has been found guilty at Lincoln. It is a most extraordinary feature in this case, that after the prosecution of these gentlemen, the minister proposed a legislative measure, in concurrence with their reasoning: Thus Mr. Drakard is punished for giving that advice which the minister himself partially adopts.* I really cannot quit this case without farther illustrating its character. The Marquis Beccaria, under the government of Milan, which was confessedly arbitrary, deprecated the severity of punishments notoriously inflicted under that government itself. Voltaire followed the Marquis's example under the arbitrary government of France. The recommendations of these writers were attended to. No attempt was ever made to punish them: yet

Query.—Could Mr. Finnerty urge the same plea for his acquittal, when accused of censuring Castlereagh?

* Most probably they were deemed libellers who first wrote against the ordeal by *fire and water*—the *corsned*—the trial by *battel*—the trial and punishment of witchcraft—the *peine forte et dure*—the tearing out of men's hearts—the use of the wheel and torture: for these writers deprecated established practice, and were innovators as well as Mr. Drakard. Yet their advice was followed, and both these writers and Mr. Drakard are equally entitled to the panegyric of all good men. Mr. Drakard's punishment will not diminish his title.

in this free state, under the "blessed, excellent, unrivalled, glorious and inestimable constitution" of England, Mr. Drakard is imprisoned for deprecating a punishment which the minister, which the government itself acknowledges to be wrong, but acknowledges it in such a manner, as to shew the necessity of setting public opinion effectively in motion, so as to oblige some men to be just. There is another circumstance connected with this case, which I cannot forbear remarking upon:—It appears that Sir Robert Wilson and General Stuart wrote against military flogging, as well as Mr. Hunt and the editor of the Stamford News: but when this circumstance was adduced in vindication of the conduct of the Examiner, the attorney-general sneered at the idea of such a comparison. Now one is at a loss to conceive any reason for such a sneer; for in point of talents for writing, at least, the editor of the Examiner or the editor of the Stamford News is superior not only to Generals Wilson and Stuart, but I sincerely believe to half the generals in the British army. But perhaps the attorney-general meant to mark by his sneer the difference in rank and station, although mental power was properly the subject before him: he selected, however, that criterion of distinction, which it is the interest of the learned gentleman to establish. As to the tenth maxim, that punishments should be proportioned to crimes, apply that to the law of libel, and the sentences pronounced under it. A libel, which has only a tendency to a breach of the peace, is punished with more severity than an actual breach of the peace: thus, contrary to every principle of reason, an encouragement is held out rather to commit the greater offence than the lesser; rather to assault a man than to censure him:*

* As to the provocation to the party attacked, and his friends, to break the peace, in order to revenge the attack, which, according to the fiction of law, is produced by a libel, it is obvious that such provocation is more likely to be produced by an actual assault than by mere censure; yet the law, as it stands, does not appear so anxious to provide against the fact, as the fiction—to protect the peace of the country from *actual* violation, as to prevent that censure which is *alleged* to have a *tendency* to such violation—because the latter is necessary to shield bad men from exposure.

but a libel is punished more severely than various felonies; nay, those monsters who ought to be excommunicated from the society of men, have not received more severe sentences than have been pronounced upon what are called libellers: for as to the treatment which these monsters experienced from the indignation of the multitude, that formed no part of their sentence. So far as the opinion of the judge was concerned, it was equally against all whom it doomed to the pillory; forgetting the maxim of one of the wisest writers that ever commented upon general law, that "by inflicting infamous punishments for acts that are not so reputed, we destroy the idea where it may be useful—we oppose law to opinion, and thus injure the character of the law, without affecting the character of the sufferer;" and forgetting also the language of Lord Chief Baron Gilbert, that "it is the crime and not the punishment which makes a man infamous; for a man," said that sensible judge, "may be pilloried for loose and scandalous words on the government; which yet in doubtful and factious times *ought not to be taken as any presumption against his credit.*"

Notwithstanding all the circumstances which I have stated, it is still affirmed, that we enjoy the liberty of the press in this country. But where is the proof? I know that the productions of some philosophical writers upon general politics are often quoted to prove the existence of a free unfettered press in England. True, we have the writings of Raleigh and Milton, and Sidney and Locke, which manifest a spirit of free inquiry and a solicitude for liberty. But will any man venture to maintain, that if an attorney-general had thought proper to prosecute any of these writers, he could not have succeeded in procuring a conviction for libel. However, what is the freedom, the force, and the spirit of those writers, compared to that of Montesquieu, of Voltaire, of D'Alembert, and Rousseau, who wrote under the arbitrary government of France, and were never interrupted in the career of their bold and broad discussion, even by a threat of libel prosecution. If then the existence of a free press is to be deduced from the writings of some philosophical politicians in England, the same conclusion may

be drawn as to France. But would any rational being insist upon such a conclusion, or conceive the toleration of such writings any evidence of the establishment of the real freedom of the press? You may publish a glowing picture of liberty and despotism, of humanity and injustice in the abstract, in any nation in Europe, where printing is permitted—you may hold up the mirror to nature—but the guilty will not look at it; and therefore these means are of little or no practical utility. To attempt to render them useful to the public, by exhibiting any living example of injustice or despotism—by endeavouring to guard the public against imposture and fraud—to restrain any knave in power, or unmask any knave seeking for power—may expose you to punishment as soon in England as in any other nation in the world.* Still it may be said, and one often hears it triumphantly urged, that we are better circumstanced in this country than they are in France. Bonaparte proclaims at once that no one shall publish any thing without his previous approbation: but it may be doubted whether his tyranny would not be more secure, if he exercised only the discretionary power of punishing those who censured his policy or his ministers.† In this country the case is different; but does this difference furnish any conclusion as to the existence of a free press in England. If it be said that the freedom of remark which appears in some of the public journals—and in the publications which sometimes issue from the press in the shape of pamphlets, prove it; I answer, that such productions only shew the courage or hardihood of the writers; for there is not one of them, or one man who writes in England, whom the attorney-general cannot crush: yes, even the highest of such publishers, if he please. How easy could it be contrived, for instance, to prose-

* You may display the rule, but if you venture to apply it; remember the fate of Junius and Horne Tooke, &c. &c. &c.

† It would be a more political tyranny in Bonaparte to allow men to publish what they pleased—to lay a trap for writers—to encourage the free expression of their sentiments, while he might crush them, if he disliked those sentiments. But then we should charge him with using a base delusion, with practising a foul policy, and his present conduct towards the Press may be considered as more manly.

cuté and make out a case in the usual strain against Mr. Whitbread, for his pamphlet upon peace; Sir Samuel Romilly, for his tract upon the criminal code; or Mr. Huskisson, for his dissertation upon the finances. Any hackneyed special pleader might charge the first with injuring the best interests of the country, by indisposing the people to the prosecution of a just and necessary war, and thus affecting the energies of government and reflecting upon its conduct. Against Sir Samuel Romilly it might be averred, that he had endeavoured to excite a prejudice against the system and administration of the laws; to bring into disrepute those institutions, "which had originated in the wisdom of our ancestors, and been clothed with the reverence of age." But what a crowd of averments might be brought forward against Mr. Huskisson; for he might be accused of injuring the public credit—of bringing the conduct of the bank into suspicion—and of seeking to shake the solidity of that system of finance which had been established by (his own patron,) "the great man now no more." It would, indeed, require but a little of that capacity for wire-drawing inferences which any crown lawyer possesses, to heighten the colouring, to swell the enormity of each of these cases. None, however, it may be said, of these publications have been prosecuted. But why?—not because they do not contain matter which might be construed into libel.*

One often hears it observed, that writers of considerable eminence have written at great length about politics, without writing a libel. But is it fair to conclude that a production does not contain what is called a libel, because it is overlooked—because

* No; but they are from men whom it would not be *prudent* to prosecute. The prosecution of a man of high rank, or parliamentary connection, might excite alarm, and produce serious inquiry. And here again I have to notice the inequality of this law. It is quite as cowardly as it is iniquitous; for it ventures to approach those only who are, comparatively, or appear to be, without the advantages of wealth, rank, and connections; and those it seeks to crush: thus justifying the application of Solon's old remark upon law. But still the administration of this law of libel establishes precedents which may be acted upon against any man in the community; and, therefore, it is the interest of all to call for its revision

it is not thought expedient, because it would not accord with policy to prosecute the writer. Did Mr. Burke ever write a pamphlet or a page before the French revolution which did not contain such matter as an attorney-general has thought proper to prosecute when published by other writers? But no attorney-general would have deemed it *prudent* to touch Mr. Burke: and here is another instance of the inequality of this law, which inequality serves often to entrap writers of less importance who are very naturally led to think that they can publish with safety, what great men have published with impunity. There are other writers from whom one sometimes hears a kind of boast, that they can write and have written a great deal without writing a libel: but, perhaps, such writers would in most cases speak more correctly if they said, that they had written a great deal without attracting notice. A writer who produces nothing to injure the cause he opposes, and, of course, nothing to serve the cause he espouses, may write on with impunity, and with the character of moderation, as that word is generally applied. Yet all this moderation or insignificance might not avail to protect such a writer, if any person thought it worth while to prosecute; for it has been well observed by a very high legal authority, that "a libel is any thing of which any one thinks proper to complain." In fact, I never saw a work upon religion, morality, or politics, which might not be perverted into a libel, according to the law of libel as laid down by our crown lawyers.

Some attempts have been made to new model this law; but nothing effective has been done. Mr. Fox's bill, which declared that the jury had the right to decide upon the law as well as upon the fact—that is, not only to decide whether the alledged libel was published or composed by the accused, but whether it was a libel or not, has really done nothing for the press; for the provisions of that bill are nugatory, unless juries are to have that evidence laid before them which is necessary to enable them to decide whether the publication be a libel or not. The judges will not admit any evidence to the truth of any alledged libel, or to the character of the party libelled. Then how is it possible for the jury to decide the question submitted for their con-

sideration. How can a jury consistently declare, that a publication is scandalous or malicious, without knowing whether it be true or false.* For instance, if a production be prosecuted containing charges of tyranny, injustice, and corruption, how can that production be pronounced criminal, when the jury are precluded from inquiring how far the charges are applicable. It is no libel, that is, it is no crime, to say that Jefferies was unjust, that Bacon was corrupt, that Laud was cruel: and if such another man as Jeffries, or Bacon, or Laud, were to arise, and the thing is within the scope of possibility, how could a jury pronounce that a libel, which should denounce that man—which should describe him in true colours—how could a jury deem it criminal in a writer to expose such a monster, and by exposing him in time, save the people from his temper—and how can that law be calculated “for the good of the community, which is the end of all law,” that should prevent such an exposure—that should prevent that which would be the best use of the liberty of the press. Yet the jury, even in such a case, would not be allowed to have any evidence before them as to the truth of the accusations, or the character of the accused. Really, the situation of a jury of conscientious men in a case of libel appears peculiarly perilous. They are called upon their oaths to decide, without being allowed to inquire. It has often struck me with

* The original framer of an indictment for libel, had a just notion of what ought to be deemed criminal; for he applied the epithets of “*false, scandalous, and malicious,*” to such a production, and undoubtedly that production which deserves these epithets, deserves punishment. But the use of the word “*false,*” raises a natural presumption, nay, justifies a conclusion, that truth was originally material in the consideration of a libel, (as indeed appears from our statute-book,) which is quite contrary to the modern doctrine. This doctrine, however, being put to the blush by the use of this word “*false*” in indictments, its omission was sanctioned by Lord Kenyon, and that sanction was some proof of the learned lord’s regard to consistency. But yet I deny that the doctrine as it now stands, is, or ought to be, the law: and I take general principles—I take the *doctrine*, that “the law is the perfection of reason,” in opposition to all authorities and precedents, for it is impossible that that which is the “perfection of reason” would condemn truth.

astonishment, that juries have not expressed to the bench their incapacity to decide, unless allowed to hear evidence as to the truth of the production laid before them, and still more the backwardness of jurors to interrogate witnesses as to the truth or falsehood of libels. Were I on a jury, I should certainly feel it my duty to be assured of the truth of the libel, and particularly when a libel depended upon facts alledged. If prevented from putting questions to that effect I would return a special verdict, or acquit. I would presume innocence where guilt was not proved. For it is an old maxim, that where there is any doubt, the jury should incline to mercy. But I need not pursue this topic farther than to refer to the tract of Sir John Hawles, on the rights and duties of jurors, which has been recently published by Mr. Cobbett, and its publication at a rate so cheap, as to be placed within the reach of every man in the community, is among the many services rendered by this distinguished author to the cause of liberty and justice. This tract is in fact of such a nature, that it is the interest of every man in the empire to read it; and it is peculiarly the duty of every man liable to serve on juries to read it with marked attention. If juries will not study their duties, and assert their rights—if they will be contented merely to echo the opinion, to register the will of the judge, instead of consulting their own judgment, and deciding for themselves, as they are bound by their oaths, their office becomes superfluous and unnecessary.* An indiscriminate deference for the opinion of a judge, is not only inconsistent with the duty of a juror, but upon questions of political libel and sedition, such deference is not warranted by common sense. For very few judges read as much about politics, or possess so much of that general miscellaneous knowledge, that acquaintance with books and men, which forms the politician, as the generality of the better order of jurors, and there is no law to be referred to

* Sir Matthew Hale says that "if a judge's opinion must rule the verdict, the trial by jury would be useless." In fact, the juror who returns a verdict, of the justice of which he is not fully assured, is perjured, *in foro conscientia*.

for the guidance of either judge or jury, upon the subject of libel and sedition. And the want of such a law ought, I should think, to be more regretted by the judges, than by any other persons. For they are bound by their oaths of office "to determine according to the *known laws* and ancient customs of the realm, and their rule herein must be the judicial decisions and resolutions of *great numbers* of learned, wise, and upright judges, upon a variety of particular facts and cases, and not their own arbitrary will and pleasure, or that of their princes."*

Such is their oath. Then as to their discretion, Coke, whom all the lawyers profess to respect, states, "that it is very necessary that the law and discretion should be concomitant, and the one to be an accident inseparable to the other, so as neither law without discretion, lest it should incline to rigour; nor discretion without law, *lest confusion follow*, should be put in use."† Judge Fortescue says, "that the discretion of the judges ought to be thus described, *discretio est discernere per legem quid sit justum*; this is proved by the common law in the case of a special verdict—and *super totam materiam petunt discretionem justiciariorum*; i. e. they desire that the judges *would discern by law what is just*, and so give judgment accordingly."‡ Now mark these passages and consider how they apply to the law of libel. Where, in fact, is the law to be found that should guide the discretion of the judges upon this subject?

With all the absurdity, contradiction, and injustice, that belongs to this law of libel, as it was characterized many years since by Lord Erskine, I cannot help repeating my astonishment, that no effectual effort has been made or even attempted by the legislature for its amendment—that nothing is done to explain precisely what it is. But instead of any remedy or modification of this extraordinary law, we have had the evil considerably aggravated by the act of Sir Vicary Gibbs. Until the learned gentleman introduced that statute, it was never attempted to hold any man to bail for a libel, for the following reasons:

* Bacon's Abridgment, 555.

† C. Treat. Bail, &c. 301, chap. 13.

‡ Fortescue Rep. 393.

“ Because a libel is not a breach of the peace.

“ Because none can be so bound, unless he be taken in the actual commitment of a breach of the peace, striking, or putting some one or more of his Majesty's subjects in fear.

“ Because there is no authority, or even ambiguous hint, in any law book, that he may be so bound.

“ Because no libeller in fact was ever so bound.

“ Because no crown lawyer, in the most despotic times, ever insisted he should be so bound, even in days when the press swarmed with the most envenomed and virulent libels, and when the prosecutions raged with such uncommon fury against this species of offender; when the law of libels was ransacked every term, when loss of ears, perpetual imprisonment, banishment, and fines of 10 and 20,000*l.* were the common judgment-fines in the *Star Chamber*, and when the crown had assumed an uncontrollable authority over the press.*”

When even that power of seizing a libeller and his papers was exercised by the secretary of state, which was put an end to through Wilkes's case, it was an acknowledged doctrine, that a man could not be held to bail for a libel, because, as it was well observed upon the authorities annexed—“ By a contrary doctrine, every man's liberty would be surrendered into the hands of a secretary of state; he would be thereby impowered, in the first instance, to pronounce the paper to be a seditious libel; a matter of such difficulty, that some have pretended, it is too high to be intrusted to a special jury of the first rank and condition; he is to understand and decide by himself, the meaning of every *Innuendo*; he is to determine the tendency thereof, and brand it with his own epithets; he is to adjudge the party guilty, and make him author or publisher as he sees good. And lastly, he is to give sentence, by committing the party. All these authorities are given to one single magistrate, unassisted by counsel, evidence, or jury, in a case where the

* *Star-Cham. Rep.* in Append. to vol. ii. part 2. *Rush. Histor. Collect.* 20, 33, 59, 60, 70. *Stat. Tri.* 297. 2 *Show. Rep.* 471. pl. 436. 2 *Lord Raym.* 767. See *Salk.* 101. pl. 15. 7 *Mod.* 9. S. C.

law says; no action will lie against him, because he acts in the capacity of a judge." 2 *Rol. Rep.* 199. *Sulk.* 397. 6 *Mod.* 46. *R. Raym.* 468. *Bac. Abr.* 555. 14 *Vin. Abr.* 579. (F) *pl.* 4.

So reasoned our ancestors. So felt Englishmen of old. But the attorney-general now possesses the power deprecated by these great authorities. He has "the power of judge and jury—he can determine any production a libel, and any man guilty," having the power to hold any man in England to bail—to detain him in custody until he finds bail, or thinks proper to bring him to trial. Thus the minister, through the instrumentality of the attorney-general, may do that which the secretary of state was not allowed to do. He may deprive any man in England of his liberty, however high in rank or station. Men of high rank or station may disregard this remark, hugging themselves in the assurance that the attorney-general would not attempt to make such use of his power—that they can safely rely upon his discretion: but they are not men of genuine English feeling who are contented with that calculation. For the same sort of calculation might be indulged, and the same security enjoyed, under the most arbitrary government on earth.* But Englishmen were not wont to be satisfied with a mere escape from arbitrary power, while in any manner exposed to its visitation—while its existence was even tolerated. It has been their feeling that the whole community, as Junius said, felt an interest in resisting the oppression of an individual, because what was done to one man, might be done to another—because it was for the common benefit to prevent the establishment of any evil precedent. That it is for the best interest of the public so to feel is obviously, is indisputably true. For what was done to poor O'Gorman might be done to any man in the country, if the attorney-general thought proper. Let then even the rich and the high beware.

* There are persons of such consequence at Petersburg, Vienna, Berlin, and even Paris, as the minister of the day would be afraid to oppress.

But how are the poor to guard against such extraordinary power as the attorney-general possesses.* O'Gorman was called upon to produce £400 bail—the man was very poor, and almost friendless; and if it were not for an individual who gave a bond of indemnity to the persons who became his bail, he might have remained in prison to this hour; had he lived so long—nay, for years; for it is not apprehended that the publication of Major Hogan's appeal, for which O'Gorman was arrested, will ever be brought to trial. But why? was it because it might be difficult to produce a conviction? No jury have yet pronounced truth to be a libel, where they have had an opportunity of knowing the truth. But, indeed, neither the attorney-general, nor the judges, appear to be consistent with themselves in their doctrine that “truth is no justification of a libel,” else why did the former abandon the prosecution alluded to; and why did the latter decline to inflict any punishment upon Draper; or why do they require a proof of the falsehood of a libel before they grant an information, or admit affidavits as to the truth of a libel when a libeller is brought up for judgment. But the judges reserve to themselves a power which is not granted to juries by the practice in trials of libel, and by the exercise of this power they admit that truth is a justification.

The whole practice and principle in this case, is, however, so repugnant to reason, and the radical principles of the British Constitution, that there is reason to hope, as public attention is now drawn to it by the multiplicity of victims suffering under its pressure, some decided legislative interposition will take place.† It is, in fact, the interest of every man in the country to call for it. For combining libel and sedition, as the same law applies to both, there is not a subject in the British

* In fact, from 10l. to 20l. perhaps more, must be paid to know the charge in a libel prosecution, and 10l. more to be admitted to make a declaration of innocence; if the declaration be not made, the party is concluded to be guilty.—What must become of a poor man in such a case?

† And in considering this multiplication of sufferers the observation of the historian naturally occurs—“there is not a more cer-

empire, who writes or speaks out of parliament, that is not liable to the visitation of this extraordinary law.

A libel is defined to be "a defamation, expressed either in printing or writing, or by signs or pictures, *tending* to expose to hatred, contempt, or ridicule, either the memory of one that is dead, or the reputation of one that is living; it may be against either a private man, or a magistrate, and the publication which may expose a man to prosecution is as complete, if communicated by an individual to another, as if published to the whole community—nay, it is the settled doctrine, that "he who reads, or repeats in presence of others, any part of a libel he hath heard, or lend or shew such libel to another, he is guilty of an unlawful publication of it"—nay, more, "if a libel be found in a man's library, he is subject to prosecution."* So much for libel: now sedition, means generally whatever is offensive to the minister of the day—whatever politics happen to be disliked by the crown prosecutor and the judges. Then who is exempt from the visitation of the law to which this essay refers: what course can save—what advice can guide a writer—who is secure against being deprived of his liberty for a libel?† I answer, no man in

tain mark of an ill-designing or impotent administration, than attempts to restrain the liberty of speaking or writing."—

2 *Macaulay, Hist. Eng.* p. 61.

This historian's remark is supported by the authority of Mr. Burke, and by all the experience of history. Libels and prosecutions have always multiplied in England just in proportion to the aggravated misconduct of the government. Libels abounded in the reigns of Charles I. and James II. John Hampden and the seven bishops were libellers, according to the judgment of the court and the crown lawyers: and yet, if it were not for these libels and libellers, kings would still exercise the power of levying taxes without consent of parliament and of dispensing with the laws.—So said the great Lord Camden. Libelling, therefore, has done good, and it never can do evil, for against honesty it has no provocation or power to act. When honesty prevails in the government there is no danger of libels.

* *Raym.* 418. 2 *Salk.* 419. 5 *Coke.* 125. *Wood. Hist.* 444. 3 *Bac. Abr.* 497.

† "That the law shall be in every particular case what any man who may happen to be a judge shall be inclined to think, liable to no review, and subject to no controul. Under such an adminis-

England, whatever his political opinions may be. For the politics and productions which may be agreeable to the government and judges of the present day, may be the very reverse with the government and judges of to-morrow. The whig is liable to be libellous and seditious in the estimation of the tory, and *vice versa*.* Therefore it is the common interest of all to have the point settled what a libel means—to have some intelligible law upon the subject, and the gentlemen connected with the press should particularly feel, that whatever side they take, whatever party they espouse, it is their interest unanimously to press for the revision of this obnoxious law. No unworthy jealousies, no little party bickering, should prevent this unanimity, or damp their spirit and exertions in the common cause. The *Courier* and the *Morning Post* may be prosecuted by one party, as well as the *Morning Chronicle* and the *Statesman* by the other. But the gentlemen connected immediately with the press are not more interested in calling for the revision than all other classes in the community. For the liberty of the press is the best property of the people—is the palladium, as it is justly called, of all liberty. The liberty of the press is, in fact, not so much the advocate, as the organ of the people—it is rather the mean of expressing, than of exciting popular sentiment—rather that which follows, than that which leads. Every attack upon the press, therefore, is, as it ought to be regarded, as an attack upon the public rights. The gentlemen connected with the press form, as it were, the vanguard in the cause of liberty, and therefore they meet the first

tration of law, no man could tell, no counsel could advise, whether a paper was or was not libellous." *Lord Erskine's speech upon the Dean of St. Asaph's case.*

* Thomas Brewster was punished as a libeller for maintaining that a King abusing his power, and endeavouring to overthrow the liberty and constitution of the country, might be legally resisted by arms; and the Chief Justice before whom he was tried, laid it down that it would be treason to resist the King by arms in any case. Yet Dr. Sacheverell was sentenced by one of the highest courts in Great Britain, for asserting that such resistance as Brewster maintained, was not lawful.

attack. But if they were borne down, the assailants would soon find their way to every other class capable of feeling and acting for freedom. The gentlemen of the press, therefore, should not be left to bear the brunt of the action, but should meet with all the aid and co-operation of the public. With such aid universally and vigorously exercised, there can be no doubt that this extraordinary law of libel would be soon revised and amended. But I perceive that Mr. Cobbett has taken up this subject, expressing a resolution to review it in all its bearings. I therefore think it unnecessary to pursue the discussion further, satisfied that the diligent, acute, and powerful mind of this writer will leave no part of it untouched—will omit nothing necessary to elucidate the character of what is called the law of libel, and to demonstrate the justice and necessity that call for its revision and amendment.

I cannot, however, wholly dismiss the subject without making some provision against the censure usually pronounced upon those who describe an evil without proposing any remedy. I have, I hope, in the course of this essay, cited enough of precedent to satisfy the lawyers, and offered enough of argument to satisfy the public, that some legislative arrangement is necessary upon the subject of libel—that I have shewn enough as to what has been, and as to what ought to be, to maintain the assertion, that truth ought not to be deemed a libel. The remedy, then, which I would propose, is simply this,—that juries should be allowed to receive evidence, as to the truth of the allegations contained in any production charged as a libel; that they should have that testimony before they deliver a verdict which the judges require, before they grant an information, and are in the habit of receiving, before they pronounce a sentence. If facts be distorted by any writer, or his inferences malicious, let it be for the jury to decide. Let the jury have *entirely* that power of *defining a libel*, which is now exercised by the judges; and let it be competent to them also; nay, let it be prescribed as a part of their duty, to accompany their verdict of “guilty,” by a declaration of their OPINION as to the degree of punishment which ought to be inflicted. By such

an arrangement as this, the law would square with reason, and with former legislative provisions upon the subject; for, according to the statutes of Edward I. and Richard II. those only were denounced as libellous, who "published false news" or "told slanderous lies."* Let the end and object of these statutes be fully answered; let falsehood be punished, and with as much severity, if you please, as Lord Coke states it to have been punished by the Lydians, and as history records it to have been punished by the Romans,† for the man who writes a deliberate falsehood, and particularly with a malicious purpose, deserves to suffer, and he must suffer, even without the consolation of pity. But let truth be free, for the freedom of its propagation, and the influence of its dominion, is necessary to our happiness here and hereafter. By the arrangement, then, which I propose, the character of honest men could never be affected with impunity, and those knaves who are amenable to the law of opinion alone, might, for the public good, be exposed with safety. That something definite and intelligible is necessary with regard to the law of libel, seems generally admitted; that some legislative arrangement upon the subject ought to be adopted, cannot, I should think, be disputed. It must be the anxious wish of juries, as conscientious men, to have the fullest evidence to the merits of any case before they decide, lest they should declare that criminal, which may be not merely innocent, but meritorious; and it must be desirable to the judges to have some *rule* established by which they may regulate their discretion; to have some system known to the public, which may avert from them any of the censure which usually does, or may, attach to the punishment of public writers; but it is peculiarly necessary to the interest of liberty and justice, that men should have some idea of what they can write or speak

* According to these statutes, the discovering of the author of any falsehood, exempted all persons who might have repeated or promoted its publication, from any degree of responsibility. But according to modern practice, authors, printers, and publishers, are punished alike. So much for the improved liberality of modern times.

† See 12 Coke, 36. *J. Wood's Hist. Civil Law*, 285.

with safety; that the law should become, as it ought, "a buoy placed upon the rock," by which writers might know how to avoid the danger; that to repeat the remark of Beccaria, every member of society might know when he was criminal, and when he was innocent. The common interest of all, then, calls for the interposition of the legislature upon this subject.*

With regard to the case of Mr. Finnerty, the Editor thinks it necessary to submit a few observations in consequence of some articles which have appeared in the *Courier* and *Morning Post*. In these articles, which are understood to proceed from the pen of Mr. Edward Cooke, the friend of Lord Castlereagh, it is alleged that the noble lord was not the minister of Ireland in 1797; it is thus endeavoured by implication to charge Mr. Finnerty with falsehood, and to induce a belief of the innocence of Lord Castlereagh as to Mr. Finnerty's charges against him. But it does not appear that Mr. Finnerty stated Lord Castlereagh to have been the minister of Ireland in 1797. He speaks about "Lord Castlereagh's government," which of course cannot be meant literally. For it was not Lord Castlereagh's government, or Lord Camden's government, but the King's government, and therefore the phrase of Lord Castlereagh's government, could only mean the government he supported—the government of which he was the principal, the most prominent advocate. Mr. Finnerty's letter does not affect the noble lord

* When we consider the interest that should prompt booksellers, (who, according to Judges Fortesque and Raymond, are punishable for libels even found on their shelves,) authors, printers, and publishers, to seek some modification of this thing, called the law of libel, we must be astonished at the passive nature of their conduct. If any one of the mechanical professions were as much affected by any grievance as the classes here mentioned are by the law of libel, sure I am, that such mechanical profession would be more active and efficient in its operations for the attainment of redress, than either authors, booksellers, printers, or publishers, have ever been upon this subject, notwithstanding the general superiority of their intelligence and means of exertion. Why do they not petition both Houses of Parliament, and do so annually, if necessary, until redress be obtained; or, why do they not, at least, endeavour to excite public attention upon the subject?

personally, until the noble lord appears to have affected him personally. It is understood that Mr. Finnerty's application to Lord Castlereagh for a passport to quit Ireland, was made to the noble lord himself, and by him peremptorily refused, although Mr. Finnerty stated to his lordship that he could not obtain any establishment or subsistence in Ireland, in consequence of the known prejudice of the government and although there was no charge whatever against him, as Lord Castlereagh himself was obliged to admit. Many things have been done in Ireland; which it is deemed convenient to deny in England; where public men must treat public opinion with somewhat more respect. But yet will Lord Castlereagh attempt to deny this part of Mr. Finnerty's statement or the execution of Orr, or pretend to be angry because that execution was attributed to the government he supported. Is it not affectation to be so sensitive upon this point.—For what does the execution of Orr, or the trial of Finnerty, signify, compared to what followed. Are not such things mere peccadillos, compared to the tortures which took place when Lord Castlereagh was actually minister, according to the confession of the attorney-general.—These tortures form the *gravamen* of the charges adduced in court by Mr. Finnerty, and they were inflicted in the months of May and June, 1798. This is indisputable. It is the policy, therefore, of Mr. Cook, and such writers, to withdraw the attention of the public from the transactions of 98—to assert Lord Castlereagh's innocence where he is not accused; and to overlook the real accusation. In prosecution of such policy, such articles as I allude to have been published. These delusions, however, cannot avail, for truth will in all cases ultimately triumph.*

* I am assured that Castlereagh was actually *locum tenens* for Mr. Pelham, as First Secretary to the Lord-Lieutenant, at the time of Orr's execution, and that the noble lord was one of the council which decided upon the execution of Orr, against the recommendation of his jury; if so, to what subterfuges does Mr. E. Cooke resort to deceive the people of England.

As to the conduct of the court towards Mr. Finnerty, that no doubt was perfectly correct in the estimation of their lordships. But as Lord Ellenborough observed in his charge to the jury, in Mr. Perry's case, that any finite being is liable to error, it may be permitted to say, that if the court had vouchsafed to hear Mr. Finnerty, when he offered himself to its attention on the motion for postponing his trial, he might have stated reasons for inducing its acquiescence in the motion.*—Strange, that if Mr. Finnerty had three or four counsel, each would have been heard, and yet he would not be allowed to offer a word himself, in addition to one counsel, who was comparatively ignorant of his case. But the most remarkable circumstance is the decision with regard to Mr. Finnerty's claim of privilege to reply to the advocates for the prosecution. To prevent this, the attorney-general quoted a rule of Lord Kenyon's, in the case of the King against Bunby, which the learned gentleman seriously and earnestly contended to make in favour of his claim to reply, nay, to decide his right. The following is an authentic copy of this case, from the 2d volume of Durnford and East's Reports, p. 483.

“ Michaelmas Term, 29th G. III.

“ Saturday, Nov. 15, 1788.

“ *The King, against Bunby and others.*

“ THE defendants, who had been convicted of a conspiracy, were brought up for judgment on *Friday, Nov. the 14th* ; and it being disputed at the bar whether the counsel for the prosecutor or prisoners should begin, the court thought it proper, in order to obviate this difficulty for the future, which had perpetually occurred, to make a general rule for that purpose ; without preju-

* It is asserted that the refusal of the motion of Mr. Finnerty's counsel to postpone his trial, in consequence of the absence of material witnesses, and the rejection of his affidavit when brought up for judgment, in consequence of some passages deemed objectionable by the court, are both proceedings without precedent. Of the latter, it is alleged that Lord Erskine has been heard to express his most decided disapprobation.

dicing the rights of the parties in this indictment; and on this day,

“ Lord Kenyon, C. J. said, That the court, after consideration, had resolved to adopt the following rule :

“ When any defendant shall be brought up for sentence on any indictment or information, *after verdict*, the affidavits produced on the part of the defendant (if any such be produced) shall be first read; and then any affidavits produced on the part of the prosecution shall be read; after which the counsel for the defendant shall be heard, and lastly the counsel for the prosecution.

“ And when any defendant shall be brought up for sentence after judgment *by default*; the prosecutor's affidavits shall be first read; then the defendant's affidavits; after which the counsel for the prosecution shall be heard, and lastly the counsel for the defendants.

“ *If no affidavits shall be produced, the counsel for the defendant shall be first heard, and then the counsel for the prosecution.*”

Mr. Finnerty presented the affidavits of Dr. Lipscomb and Mr. Power, which were admitted.—Of course, according to this rule, Mr. Finnerty had the right of reply: yet the attorney-general's claim was established by the court. It is said that Sir Vicary Gibbs only read the first rule, which did not apply to the case of Mr. Finnerty. If so, the court was misled by the learned gentleman.* But Mr. Clifford distinctly asserted that, the right of reply belonged to Mr. Finnerty, under the terms of the rule. The court, however, did not require to look at the rule, and thought proper to decide otherwise. Upon this I think it unnecessary to make any comment.

From this case of Mr. Finnerty alone, and the circumstances it discloses, it is apprehended that the English nation may collect

* “An honourable barrister will never mis-state either law or facts within his own knowledge.” *Christian's note to Black. Com. vol. iv. p. 356.*

quite enough, as to the manner in which their fellow-subjects of Ireland have been treated, to account for the disturbed state of that country for years. It will be seen, that if the Irish have been deemed restless and irritable, it was only because they were not allowed to rest, because they were perpetually irritated, and the same causes would produce the same effects in any other nation deserving to be free. But I have never heard the conduct of the Irish people censured in England by those who had any knowledge of the provocation they received, and the general ignorance of those by whom that people are censured, is really, in some degree, excusable. The tyrants who have maltreated the Irish, have always been in the habit of describing them in England as barbarians, in order to excuse or palliate the barbarous manner in which they have treated them. Hence the retaliation or revenge of the Irish people upon their oppressors, have been exaggerated to the extreme of hyperbole, while scarcely a rumour has been heard of the aggression; because, while a whole nation may be abused and slandered with impunity, he who attempts to expose or reprobate one of its oppressors, may, under the law of libel, be condemned, like Mr. Finnerty, to pine in a jail. Is it consistent with the interests of truth, justice, and *liberty*, to allow the existence of such a law. Yes, of LIBERTY. For unfashionable as the word has become of late years among public men, liberty has surely performed enough of *quarantine* to get rid of any infection she may be supposed to have caught from her intercourse with the French revolution, to entitle her interests to a gracious attention among the people of England; in that country which an orator has emphatically denominated "*Liberty's favourite abode*," but to which that denomination can never, I contend, be correctly applicable, while the law of libel remains in its present state.

The Proceedings in the Case of the King, at the Prosecution of Lord Castlereagh, against P. Finnerty.

UPON the 29d of January, 1810, the letter from Mr. Finnerty, which is recited in the Indictment, appeared in the Morning

ERRATA.

PAGE	LINE.	
4	38	<i>dele</i> " the Court"
51	32	<i>dele</i> " for it"
20	20	<i>for</i> Tompson, <i>read</i> Thompson
43	21	<i>for</i> doctrines, <i>read</i> doctrine
53	13	<i>for</i> cutting off of ears, <i>read</i> cutting off ears
54	28	<i>for</i> Election, <i>read</i> Elections
55	45	<i>for</i> the law, <i>read</i> the bar
56	7	<i>for</i> punished, <i>read</i> restrained.

FROM THE FOLLOWING REPORT.

Court of King's-Bench, London, July 10, 1810.

Mr. Curwood moved for a rule to shew cause why the trial of the defendant, which had been fixed for the sittings after this term, should not be put off until the sittings after Michaelmas Term. The learned counsel said that he moved this on the affidavit of the defendant, which stated, that in consequence of the period at which his trial had been fixed, he had found it impossible to give notice to several material witnesses so as to have them present in time for the trial. Those witnesses were the Right Honourable George Ponsonby, the Right Honourable John Forster, the Right Honourable Wm. W. Pole, Sir Jonah Barrington, Major Edwards, Richard Martin, Esq. Lord A. Beauclerc, and Captain Parish. The two last of

these witnesses the affidavit stated to be at sea, and the others in Ireland.

The Attorney-General observed that it would be necessary to state in the affidavit the objects or facts to which those witnesses were to be brought. Nothing like a general affidavit could be admitted for such purpose.

Mr. Curwood was unacquainted with the facts of the case; he merely knew that it was a prosecution for a libel at the instance of Lord Castlereagh against Mr. Finnerty; and it could not be expected that he should detail all the particular objects to which witnesses might be necessary,

Lord Ellenborough said he would grant the rule as it stood at present, but then the party must take it at his peril. It would be more advantageous for him to withdraw the motion, and to come with his amended affidavit to-morrow. The motion was accordingly withdrawn.

July 11th.

SAME against SAME.

Mr. Curwood, on the part of the defendant, repeated his motion of yesterday, for putting off the trial from the sittings after the present, to the sittings after Michaelmas Term. The learned counsel stated that the indictment, contrary to the usual custom, did not point out any particular parts of the paper in question, but embraced the entire. The principal point, however, seemed to be a charge upon Lord Castlereagh of having originated an order for the arrest of Mr. Finnerty, in order to prevent him from going to Walcheren. Mr. Finnerty's purpose was to write a history of the expedition; and by the order of the noble secretary, he was marked out and rendered unable to accomplish his object. The other points were collateral, and alluded to acts of cruelty and oppression committed by the noble lord against the defendant and others in Ireland. The presence of the witnesses who were now required, might, he observed, be necessary not only to substantiate the truth or falsehood of the libel, but to shew whether the paper were a libel or not. If a man reasoned falsely from true facts, or truly from false ones, for the purpose of attacking an individual, the work might be a libel, but when both facts and reasoning were true, it might be only an allowable disquisition, and ought not to be visited with any share of blame by the court. Witnesses might be called to those facts, and it was upon the absence of such witnesses that the application to put off the trial was made.

Lord Ellenborough. What, are we, at this time of day, to dispute about truth being a justification of a libel. The libel is in-

dependent of facts. A calumnious intention may be evident, independently of facts. You admit that the defendant charged Lord Castlereagh with abusing the powers of his high office for the gratification of his private malice. That requires no facts, and therefore no witnesses to the facts, for *nothing can be more calumnious*.

The Attorney General. I shall give them a little information on the subject. Lord Castlereagh never heard of the order until after it was issued, until his arrival at Deal.*

Lord Ellenborough. The rule cannot be granted, under this affidavit. Witnesses are only necessary to the facts. Facts are not necessary here to the calumnious intention. Why then wait for witnesses which, if forthcoming, we should not allow to be examined.†

Mr. Finnerty then attempted to address the court. *Lord Ellenborough*, on inquiring his name, immediately desired him to sit down. "You shall not be heard, sir; you have been already heard by your counsel. The rule was accordingly *refused*."‡

* The noble lord was at Deal before, at the time, and after the order was issued. (See Mr. Power's affidavit.) What then was the object of the Attorney-General's assertion? Was it thought expedient, on the part of Lord Castlereagh, at first to disclaim that order which it was afterwards attempted by his advocates to justify.

† Would not testimony have been admissible to explain innuendoes, to illustrate doubtful passages; and how could deponent, his counsel, or any other person, speak to the precise extent or nature of the deposition of any of those witnesses.

‡ Mr. Finnerty was, we understand, induced to calculate upon the acquiescence of the Court of King's Bench, in his motion from its own uniform practice; from never having heard of the court's rejection of a similar motion in any criminal case, and particularly from precedents established by the present court itself in various instances. But Mr. Finnerty especially founded his calculation of success upon the following precedents, which, among others, happened to come to his knowledge before the motion was made.

IN THE KING'S BENCH.

The KING against JOHN LAMBERT and JAMES PERRY.

JAMES PERRY, of the Strand, in the county of Middlesex, Esquire, one of the defendants in this cause, maketh oath and saith, That an information was exhibited against this deponent and the above-named John Lambert by his Majesty's Attorney-General in Hilary Term last past, and that notice was given for the trial thereof at the sittings after this present Trinity Term; and this deponent further saith, that Sir John Moore, Knight of the Bath, and Major General of his Majesty's forces, who was at Sicily at the time mentioned in the publication of the newspaper which contains the matter on which this information is founded, is a material witness for him, this deponent, in the said cause, as he is advised and believes, and that he cannot safely proceed to the trial thereof without his testimony, and that the said Sir John Moore is now out of this kingdom, but is expected to return before the next Term; this deponent therefore humbly hopes that this honourable Court will be pleased to postpone the trial of this cause until the next Term, that he may have the benefit of the testimony of the said witness.

JA. PERRY.

Sworn in Court this fifth }
day of July, 1808. }

By the Court.

In consequence of this refusal Mr. Finnerty, after having attended at the Crown Office to see the jury struck, and inquired about those whose names were upon the list, thought proper to decline going to trial, and to let judgment go by default.

IN THE KING'S BENCH.

The KING against JOHN LAMBERT and JAMES PERRY.

JAMES PERRY, of the Strand, in the county of Middlesex, Esquire, one of the defendants in this cause, maketh oath and saith, That an information was exhibited against this deponent and the above-named John Lambert by his Majesty's Attorney-General, in Hilary Term last past, and that notice was given for the trial thereof at the sittings after Trinity Term last; and this deponent further saith, that he did in Trinity Term last apply to this honourable Court to postpone the trial of this cause until this present Michaelmas Term, on account of the absence of Sir John Moore, Knight of the Bath, and Lieutenant General of his Majesty's forces, who was in Sicily at the time mentioned in the publication of the newspaper which contains the matter on which this information is founded, and who was a material witness for him, this deponent, in the said cause, as he was advised, and that he could not safely proceed to the trial thereof without his testimony, and that the said Sir John Moore was then out of this kingdom, but expected to return before the then next Term, upon which application this honourable Court was pleased to postpone the trial of this cause until this present Michaelmas Term; and this deponent further saith, that the said Sir John Moore, as he believes, did return to England some time after the said Trinity Term, and has since gone abroad in his Majesty's service; and this deponent further saith, that notice of trial hath been given for the sittings after this present Michaelmas Term, and that the said Sir John Moore is still out of this kingdom, and that he this deponent cannot safely proceed to the trial of this cause without his testimony, as he is advised and believes; this deponent therefore humbly hopes that this honourable Court will be pleased to postpone the trial of this cause until the next term, that he may (if possible) have the benefit of the testimony of the said witness.

JA. PERRY.

Sworn in Court the 24th day of }
November, 1808. }

By the Court.

The Court also postponed the same cause twice afterwards, in consequence of the absence of Mr. Drummond, whose testimony Mr. Perry deposed to be necessary upon his trial.

But a number of similar affidavits could be quoted from the files of the Crown Office in which the Court acceded to similar motions; yet the Court the motion of Mr. Finnerty's counsel was rejected, although founded upon an affidavit, of which the following is a copy.

IN THE KING'S BENCH.

The KING on the prosecution of Lord Viscount CASTLEREAGH against PETER FINNERTY.

PETER FINNERTY, of Clement's Inn, in the county of Middlesex, Gentleman, the above-named defendant, maketh oath and saith, That issue was joined in this prosecution in this present Trinity Term, and that notice of trial was given thereon on Wednesday last; and this deponent further saith, that the Right Honourable George Ponsonby, the Right Honourable John Foster, the Right Hon. Wm. W. Pole, Sir Jonah Barrington, Baronet, Major Edwards, Richard Martin, Esquire, Lord A. Beauclerc, and Captain Parish, are material and necessary witnesses for deponent on the trial of the said indictment, as he is

Court of King's-Bench, January 31, 1811.

Mr. Bevan prayed the judgment of the court against *Mr. Finnerty*, who not being in court, was immediately sent for, and in a few minutes made his appearance. Upon his appearance, *Mr. F.* stated that he had for some time laboured under a severe indisposition, and requested permission to take a seat.

Lord Ellenborough replied, that the defendant might take a seat while the indictment was reading, and that he should be told when it would be proper for him to rise. *Mr. Finnerty* took a seat accordingly, and the clerk read the indictment, of which the following is a copy.

Of Easter Term in the Fiftieth Year of the Reign of King George the Third.

MIDDLESEX.

BE IT REMEMBERED, that at the General Session of the Peace of our Lord the King, holden in and for the County of Middlesex, at the Session House for the said County, on Monday the nineteenth day of February, in the Fiftieth Year of the Reign of our Sovereign Lord George the Third, by the Grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, before William Mainwaring, Thomas Leach, William Wat-son, John Hanson, Esquires, and others their Fellows, Justices of

advised and verily believes, and that this deponent cannot safely proceed to the trial thereof without the testimony of the said witnesses,* "because the Right Honourable Wm. W. Pole, Lord A. Beaclerc, and Captain Parish are material with respect to the order described in the alledged libel to prevent deponent from going to Walcheren, which order deponent complains of as subjecting his character to slander, as putting his liberty and life in peril, and because the Right Honourable George Ponsonby, the Right Honourable John Foster, Sir Jonah Barrington, Baronet, Major Edwards, and Richard Martin, Esquire, are material with respect to the conduct of Lord Castlereagh in Ireland, and the treatment experienced by deponent, to which deponent refers in the alledged libel;" and this deponent further saith, that the said Right Honourable George Ponsonby, the Right Honourable John Foster, the Right Honourable W. W. Pole, Sir Jonah Barrington, Baronet, Major Edwards, and Richard Martin, Esquire, are now in Ireland, as this deponent has been informed and believes, and that he cannot serve his subpoenas in sufficient time to have their attendance at the sittings after this Term; and that the said Lord A. Beaclerc and Captain Parish are at sea, and that he does not expect their return until the next Term, by which time he is informed and believes that he shall be able to procure their attendance as well as the attendance of the other witnesses above mentioned.

PETER FINNERTY.

Sworn in Court this 9th day }
of July, 1810. }

By the Court.

* The part within inverted commas was inserted in consequence of the recommendation of the court upon the first motion of counsel.

our said Lord the King, assigned to keep the Peace in the County aforesaid, and also to hear and determine divers Felonies, Trespases, and other Misdemeanours committed in the same County, by the Oath of Twelve Jurors,* good and lawful Men of the County aforesaid, now here sworn and charged to inquire for our said Lord the King for the Body of the same County. It is presented as followeth, that is to say:

MIDDLESEX TO WIT. The jurors for our Sovereign Lord the King upon their oath present, that before the time of the printing and publishing of the scandalous and malicious libels herein after mentioned, to wit, on the twenty-sixth day of July, in the forty-ninth year of the reign of our Sovereign Lord George the Third, by the Grace of God of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, and long before and afterwards, The Right Honourable Robert Stewart, commonly called Viscount Castlereagh was, and had been, one of the principal Secretaries of State of our said Lord the King, to wit, at Westminster, in the County of Middlesex. Nevertheless, PETER FINNERTY, late of Westminster, in the County of Middlesex, Gentleman, well knowing the premises, but being a person of a malicious and ill disposed mind, and unlawfully and maliciously devising and intending to traduce, defame, and vilify the said Robert, and to bring him into great and public scandal, hatred, and contempt, among all the liege subjects of our said lord the king, and to insinuate and cause it to be believed by and amongst the liege subjects of our said lord the king, that the said Robert had, *from personal malice and ill-will* towards him the said Peter Finnerty, employed and made use of the authority and influence of him the said Robert, as such Secretary of State as aforesaid, *to injure, aggrieve, harass, and oppress him the said Peter Finnerty,* and also to insinuate and cause it to be believed by and amongst the liege subjects of our said lord the king, that the said Robert had, as a person formerly employed by our said lord the king in the administration of our said lord the king's government of Ireland, *been guilty of great tyranny, cruelty, and oppression,* did heretofore, to wit, on the twenty-third day of January, in the fiftieth year of the reign of our said sovereign lord the king, at Westminster, in the county of Middlesex, unlawfully and maliciously compose, print, and publish, and cause and procure to be composed, printed, and published, a certain scandalous and malicious libel of and concerning the said Robert, and the conduct and behaviour of the said Robert, as such Secretary of State as aforesaid, and of and concerning the supposed administration of the government of Ireland by the said Robert, and the conduct and behaviour of the said Robert in such supposed administration, and of and concerning himself, the said Peter Finnerty, and also of and concerning certain orders in and by the said libel, supposed and alledged to have been made and issued, concerning and relating to himself, the said Peter Finnerty, containing therein divers scandalous and malicious matters and things of and concern-

* According to law, the names of all the jurors should have been recited.

ing the said Robert, and his conduct and behaviour as such Secretary of State as aforesaid, and also of and concerning the supposed administration of the government of Ireland by the said Robert, and the conduct and behaviour of the said Robert in such supposed administration, to the tenor and effect following (that is to say) Lord Castlereagh (meaning the said Robert) and Mr. Finnerty (meaning himself the said Peter Finnerty.) To the Editor of the Morning Chronicle: Sir, Having been always of opinion that the man who tamely submits to persecution, is second only in criminality to him by whom it is wantonly inflicted, I cannot permit any prudential consideration to restrain me from giving publicity to what I conceive to be a very extraordinary instance of unworthy prejudice and abused power, and to this publication I am the more disposed in consequence of some gross misrepresentations which have been circulated upon the subject. Many of those misrepresentations, indeed, I found afloat upon my return from Walcheren; but while the discussions prevailed which arose out of the contest between Lord Castlereagh (meaning the said Robert) and Mr. Canning, I declined to take any public notice of the misconduct of the former (meaning the said Robert) lest I should expose myself to the suspicion of becoming a partisan, of wishing to incline the scale in favor of the latter, for whom, from the whole course of his political life, it is impossible that I should feel any degree of solicitude. The question involved in those discussions being now generally settled, the motive for my forbearance is at an end, and I take leave, with deference, to submit my case to the consideration of the public. Having received an invitation to go with the late expedition to Walcheren, for the purpose of writing a narrative of its proceedings, accompanied with an assurance of the highest professional aid, I was encouraged to undertake the task. With the view of writing a work of that tendency, and in order occasionally to communicate to you some report of the passing events, I sailed to the Island of Walcheren. I arrived at the Rompoot the day after the disembarkation of the troops, and was astonished to learn, that immediately before the fleet sailed from the Downs, the following order had been issued: "His Majesty's ship, Venerable. "Downs, July 26, 1809, Mem. It is my directions that the captains "and commanders of His Majesty's ships and vessels under my command, do report whether there is a person or gentleman of the name "of Peter Finnerty (meaning himself the said Peter Finnerty) on board "any of His Majesty's ships, and in what capacity, and if he is, to send "him here. It is my directions that the agents of transports make inquiry, and report the same (signed) R. Strachan. To the respective "captains, &c. &c. &c." I was naturally unable to account for the motive or object of such an order, which, having sailed from the Thames, I had then heard of for the first time. But I was not suffered to remain long in suspense; I soon received a message from a friend, assuring me that the order "which originated with Lord Castlereagh" (meaning the said Robert) was of an hostile nature, and exhorting me to return to England forthwith, lest I should experience harsh treatment. Notwithstanding the representations I received, as I could not persuade myself to believe that an officer, whose brow was covered with

laurels, would become the instrument of persecution, as I was not conscious of having ever done any thing that should offend a brave man, and as I flattered myself that such a man as Sir Richard Strachan could not be my enemy, unless through the influence of misrepresentation, I determined to wait upon him. For that purpose I proceeded to his flag ship, where I learned that he was on shore, but I left my name. Some time after I went on shore, and there I found that the order I have alluded to, was universally known: I there, too, discovered that Lord Chatham had had a similar order from Lord Castlereagh (meaning the said Robert). But I must say, that although the existence of such an order was universally notorious, although the motive from which it sprung, and the impression which it was meant to produce, was quite obvious, although it was intended to excite a war-whoop against me, (meaning himself, the said Peter Finnerty) although the original issuing, and subsequent circulation, of such an order conveyed a very direct intelligible intimation, I never experienced either insult or injury from any individual whatever belonging to the army or navy; and this circumstance serves to justify and to heighten the respect and regard which I have always entertained for these gallant professions which suffer most for the public service and are least rewarded. After being in Walcheren about ten days, Sir Richard Strachan entered a room where I was writing, accompanied by Captain Parish of the navy, by whom he was introduced to me. The terms in which this gallant officer addressed me were precisely such as I expected from his character. In fact he spoke in a strain of regret that the necessity had been imposed upon him of issuing such an order as I have stated, at Deal, which he had done in consequence of an intimation from the Secretary of State, and an official order—adding, however, that as Lord Chatham and he had received a similar order, “they must feel unpleasant at my remaining in the island.” Such were his words. And on my observing that if it were the object of the order to prevent the newspapers from receiving any communication, that object could not be accomplished, as there were several other observers in the island. Sir Richard Strachan answered that he knew nothing of such matters, and that the order referred to me alone. I said that it was my intention soon to return to England, and that I knew the order alluded to, proceeded from Lord Castlereagh, (meaning the said Robert) of whose character it was quite worthy. Sir Richard remarked that he had nothing to do with politics, and expressed a hope that I would consider him but as a mere agent in the transaction, and a wish that I should go home in a vessel of war; assuring me that I might rely on receiving the kindest treatment, I could desire. With the latter request I saw no objection to comply, and therefore I acquiesced. I was accordingly referred to Lord Amélius Beauclerc, who was directed to procure me a passage. For this passage I waited some time at Terveer, until, indeed, the events of war had terminated, and then I was accommodated in a revenue cutter, by which I returned to this country. Thus, to please Lord Castlereagh, (meaning the said Robert) I was sent home at the public expense. It is here, however, but fair to state, that Lord A. Beauclerc shew-

ed no disposition to hurry me out of the island. It is not only just towards his character, but grateful to my own feelings, to declare that, in him I witnessed nothing of a disposition to gratify the persecuting spirit of Lord Castlereagh. (meaning the said Robert) No! the genuine, bold, and independent character of a naval officer is ill suited to sycophancy, or to administer to the vindictive passions of any man in power. Whether Lord Chatham ever issued this order I am unable to say. I was told that he had, but as no attempt was ever made to execute it, I have some doubts upon the subject. The order of which I complain, must have been issued by Lord Castlereagh (meaning the said Robert) from one of two motives, either from a wish to deprive me of the opportunity of making any observations upon the conduct of the expedition, or to fix upon my (meaning the said Peter Finnerty's) character, the imputation of some illegal purpose. If the former were his motive, then he was afraid of any publication of the truth, and did not wish the people of England to be fully informed of the course which he and his agents were about to pursue; but if the latter motive actuated his (meaning the said Robert's) conduct; if it were his object to fix an imputation of illegality upon my (meaning the said Peter Finnerty's) views, what opinion must the public form of his (meaning the said Robert's) sense of liberality and justice. I defy the noble lord (meaning the said Robert) to adduce any evidence to justify such an imputation. If there be any charge against me, let it be openly and legally preferred, and openly and legally I am ready to meet it: but is it to be endured by the liberality of England; is it reconcilable with the precepts of justice, or the principles of the constitution, that a British minister shall be at liberty thus to abuse his official power; shall be allowed by any secret order to proscribe the character, to invite the persecution of any individual? I am fully assured that Lord Castlereagh (meaning the said Robert) is alone responsible for this order; that it was solely and exclusively his (meaning the said Robert's) own act, with the knowledge, perhaps, of Lords Mulgrave and Chatham, and no doubt with the full approbation of Mr. Edward Cooke, his trusty friend and coadjutor *during the torture of my unfortunate countrymen*: but that the noble lord (meaning the said Robert) has acted upon this occasion without the consent or knowledge of any of the more important of his colleagues in office, I have not the slightest doubt. Whatever may be my opinion of those colleagues in other respects, I do not think there is one among them who would recommend or approve of such a proceeding. I know it may be said with regard to the particular act which gave rise to this letter, that according to martial law, a commanding officer is authorized to prevent any man from accompanying his force whom he thinks proper to suspect: but although the existence of this right may be undeniable, the expediency of its exercise may be very questionable. The right of a court of law to inflict punishment is indisputable; but that right would not justify the infliction of undeserved punishment. Sir Richard Strachan or Lord Chatham might have had the right to send me home; but does the admission of that right tend in any degree to acquit Lord Castlereagh

(meaning the said Robert) as to the malicious misrepresentation of my (meaning the said Peter Finnerty's) character, which would prompt those officers to exercise it. That Lord Castlereagh (meaning the said Robert) hates me (meaning himself, the said Peter Finnerty); Mr. Editor, I know, and I am proud of it: I feel that it would require a much higher character than I can ever hope to possess to withstand his approbation. It has been the study of my life to deserve the hatred of such a man: but how have I (meaning himself, the said Peter Finnerty) deserved it? Not by the breach of any moral obligation; not by any offence against the principles of justice—No, no! Lord Castlereagh (meaning the said Robert) has become my (meaning the said Peter Finnerty's) foe, for the very reasons why a free and a humane people ought to be my friends, as I flatter myself I shall be able to shew. It will not, I hope, be deemed impertinent or obtrusive in me to offer myself on this occasion to the attention of the public. I have been most foully slandered, and to remain any longer silent would be to betray a culpable indifference to the preservation of my own character and to the weight of public opinion. Lord Castlereagh (meaning the said Robert) has endeavoured to stigmatize my name; and that character, which a minister of the crown has thought worth attacking, it will not I hope be deemed presumptuous in me to think worth defending. The public have heard of the attack, and let me hope that their sense of justice and liberality will dispose them to attend to my defence: but before I enter into that defence, I think it right to state, that I do not ascribe Lord Castlereagh's (meaning the said Robert's) persevering hostility against me (meaning himself, the said Peter Finnerty) to the mere difference of political opinion: I am not disposed to give the noble lord (meaning the said Robert) credit for such a degree of attachment to any political principle, as would prompt him to become the particular enemy of its opponents, unless those opponents contributed to impede his (meaning the said Robert's) personal views. No, the motives of his (meaning the said Robert's) aversion to me (meaning himself, the said Peter Finnerty) I fully understand. He (meaning the said Robert) is tolerably aware that I have some knowledge of his real character, and that I have not omitted to propagate that knowledge; besides, he (meaning the said Robert) has deeply and frequently injured me (meaning himself, the said Peter Finnerty); and therefore, according to the old adage, he (meaning the said Robert) cannot forgive me (meaning himself, the said Peter Finnerty). But, to proceed to the first cause of my introduction to his notice, with regard to which so much foul calumny has gone abroad in this country:—In the course of Lord Castlereagh's (meaning the said Robert's) administration of the government of Ireland, I was persecuted in consequence of a publication which appeared in a newspaper, entitled the Press, with which I was connected. In that publication the government of Lord Castlereagh (meaning the said Robert) was censured for the following act. A Mr. Orr, who was a respectable and intelligent farmer of the county of Antrim, was tried, and a verdict was returned that he had administered an unlawful oath (that of the United

Irish) to a common informer of the name of Wheatley, who swore, that having met Mr. Orr casually on the public road, he was taken home by him, and that Mr. Orr at once committed himself by administering the unlawful oath alluded to. The verdict of the jury upon such evidence was, however, accompanied by a strong recommendation of the prisoner to mercy; but soon after the verdict, three of the jurymen made a solemn affidavit before the judge who tried the cause, that liquor had been conveyed into their room; that they were imposed upon by some of their fellow jurors, and threatened by others, if they did not find the prisoner guilty; and that under the influence of imposture and threats, and being old men, worn down by watching and intoxication, they had given a verdict against him, although they believed him in their own conscience to be innocent. Affidavits were also made by a Mr. Elder, a protestant clergyman, and a Mr. Montgomery, that Wheatley, being indisposed and apprehending the approach of death, had stated to them that his conscience was much disturbed in consequence of his having been guilty of perjury and murder. These affidavits, together with a recommendation to mercy from the jury, seconded by the strongest recommendation of the judge (Lord Yelverton), were transmitted to the government of Lord Castlereagh (meaning the said Robert), and yet Mr. Orr was executed.* This, which is a matter of undeniable history, was the proceeding animadverted upon in the paper I allude to; and is it possible that any newspaper could be found in England, even in the most degenerate state of the press, which would not reprobate such a proceeding? Yet for that reprobation I was arrested and committed to prison; and while there, previous to my trial, every effort of intimidation, persecution, and proffered bribery, was made use of to extract from me the name of the author of the article I have referred to; twice was I taken from my prison, in the most extra-judicial manner, to the office of the superintendent magistrate of Dublin, where, surrounded by a group of police magistrates and other agents of Lord Castlereagh's (meaning the said Robert's) government, I was threatened with a variety of prosecutions for libel, and more rigorous confinement, if I did not betray the author of the article for which I was imprisoned, and also the names of the several gentlemen whom I knew to have written for the press. Threats being found unavailing, I was offered pecuniary reward and instantaneous release from prison if I would comply with the wishes of this assemblage; but I spurned at their proposition, and for this I was persecuted. Because I would not betray my friends—because I would not violate confidence—because I would not abandon the cause of liberty, of truth, of humanity, and of my country—because I would not be guilty of a breach of professional duty and private honour, I was subjected to every degree of ill treatment and injury that "rigour beyond the law" could inflict. Who, then, let me ask, ought to be the subject of censure for such proceedings? Is it in the country in which Hampden and Russell acquired immortality, by dying for freedom, that censure should attach to any man for suffering in that sacred cause? Is it in any coun-

* Mr. Curran's speech upon my trial contains a full detail of this transaction.

try respecting the principles of humanity and justice, that that censure which ought to be confined to the oppressor, should be levelled alone at the oppressed? Will it be endured by any description of persons, to whose opinion it is possible for a man of common honesty or common sense to attach any value, that tyranny shall transfer to its victim that odium which ought to attach to itself? So much, indeed, did even the Viceroy of Ireland, Lord Camden, revolt at the severity with which I was treated, that upon a simple remonstrance, he, at the moment of his departure from Ireland, ordered my liberation, when not more than half the period prescribed in my sentence had expired: and I cannot pass by this act of Lord Camden's clemency, without stating my opinion, which is justified by other facts that have come to my knowledge, that no degree of cruelty is fairly attributable to the disposition of that nobleman. As soon as Lord Camden had left Ireland, and not till then, it was officially intimated to me, that notwithstanding his lordship's order, I was not to be liberated until bail was procured for my conduct for seven years, to the amount of 2000*l*. Thus were Castlereagh (meaning the said Robert) and Cooke determined to counteract the benevolent intentions of Lord Camden; and they flattered themselves with the prospect of complete success from the intimidation meant to be employed towards any man who offered to become my bail. This intimidation was indeed actually employed, and very industriously too towards some of those who originally offered; but yet, in despite of these artifices, bail was entered by two public spirited gentlemen, who have never had any reason to regret their pledge for my conduct, and I was liberated. After my liberation, I found that it was quite impossible for me to make a settlement in Ireland, with any prospect of success, while the frowns of such men as Castlereagh (meaning the said Robert) and Cooke, who monopolized the power of the government, were so decidedly fixed upon me; I therefore determined to quit Ireland, and applied to Lord Castlereagh for a passport, which, according to the order of his government, was required of any man about to leave the country; but to this application, twice or thrice repeated, Castlereagh (meaning the said Robert) replied, that "it was not the pleasure of his Excellency the Lord-Lieutenant to comply with my request:" thus profaning the name of the brave and humane Cornwallis, who, according to the best information I could collect, knew nothing of my case, to facilitate his own persecuting purpose. What will the public think of Lord Castlereagh's (meaning the said Robert's) feelings, when I state, that at the period of which I am writing, I was not twenty-one years of age. With regard to the calumnies sent into circulation against me in this country, they are unworthy of serious notice, particularly considering the base character of those from whom they proceed. The man who resolves to do good, as I have before observed respecting these calumniators, must calculate upon the hostility of the bad, and that that hostility will be virulent in its nature just in proportion to the activity of his exertions or the efficiency of his services; therefore so long as that hostility vents itself in mere abuse, a man who forms the resolution I have mentioned, should look upon it without pain. Indeed he should rather consider

it as a flattering testimony of his exertions to annoy bad men, and as the natural expression of their resentment. But when any thing is said or done that is calculated to produce a misconception of his character and views, or to subject him to a persecution which may be repeated upon others, then a sense of duty towards himself, and the public should prompt him to stand forward. Upon that ground I have been urged on this occasion to offer myself to public attention. Lord Castlereagh (meaning the said Robert) may feel himself justified in the entertainment of a personal and political prejudice against me; but with regard to the order, of which I complain, the question is, whether he (meaning the said Robert) be justified in making use of his ministerial power (meaning the power of the said Robert, as such Secretary of State as aforesaid) to gratify that prejudice—to invite the persecution of my (meaning the said Peter Finnerty's) person, and to fix an imputation upon my (meaning the said Peter Finnerty's) character—whether he be justified in an attempt to establish a most dangerous precedent. This question I will, without further comment, leave to be determined by the justice, the liberality, and the good sense of the English people. P. FINNERTY.

To the great scandal, injury, and disgrace of the said Robert. In contempt of our said lord, the King, and his laws, to the evil example of all others, and against the peace of our said lord, the King, his crown and dignity.

Examined. THE RIGHT HONOURABLE, ROBERT STEWART,
Commonly called VISCOUNT CASTLEREAGH,

JOHN LENNARD,

JOHN LAMBERT,

SWORN IN COURT.

TRUE BILL.

There are two other counts in the indictment which it is here unnecessary to insert, as they contain merely a repetition of the foregoing count.

When the indictment had been gone through, Mr. Finnerty presented himself to the attention of the court, in order, as he said, to put a question to their lordships. But *Lord Ellenborough*, who observed Mr. Clifford rise at the same time, inquired whether Mr. Finnerty had any counsel.

Mr. Finnerty. I request to know whether, if Mr. Clifford should address himself to the court upon those parts of the case which may require technical knowledge, I shall thereby be precluded from addressing the court also, and particularly in reply to the prosecutor's counsel. This question I think it necessary to submit to your lordships in consequence of a difficulty which oc-

curred to me on a former occasion through my disacquaintance with the practice of this court.

Lord Ellenborough. I will not allow any new mode contrary to the general practice of the court. The rules of the court are, that a defendant may either speak by his counsel or by himself, but not by both.

Mr. Finnerty. Then, my lord, I must undertake myself the conduct of the cause.

The counsel for the prosecution being asked whether they had any affidavits to present, Mr. Garrow answered in the negative.

Mr. Finnerty being applied to, presented an affidavit, which the clerk proceeded to read as follows :

IN THE KING'S BENCH.

The King against Peter Finnerty.

PETER FINNERTY, of Clement's Inn, Westminster, in the county of Middlesex, gentleman, maketh oath and saith, that having been indicted for an alledged libel against the Right Honourable Robert Stewart, commonly called Viscount Castlereagh, notice of trial upon the said indictment was served upon deponent's attorney towards the close of the last Trinity Term. Saith, that from the time at which the said notice was served, deponent felt it impossible to subpoena by the day of trial certain witnesses, whom he thought indispensable to his defence, some of whom were then in Ireland, and others abroad upon his Majesty's service; that therefore deponent directed his attorney to call upon the attorney for the prosecution, to state frankly to him the circumstances in which he, deponent, was placed; to express a hope that no advantage would be taken of his situation; and to request that the trial might be allowed to stand over until the following term, by which time he (deponent) had reason to believe that he would have been prepared with the necessary evidence to make his defence. But to this application deponent's attorney received a peremptory refusal.—Saith, that in order to guard against being forced to trial in such an unprepared state, deponent had a motion made in this honourable court to postpone his trial, which motion was grounded upon an affidavit, stating the names of the witnesses alluded to, and the importance of their testimony for deponent's justification. But this motion having been rejected, and this honourable court having in the course of the discussion which took place upon it expressed an opinion, that nothing could be more calumnious than a particular allegation which deponent's advocate happened to quote from the alledged libel; and this honourable court having also said, that no evidence to the truth of the alledged libel would be admissible, if even forthcoming, "as truth was no justification:" deponent saw

no advantage that he could derive from having his case brought before a jury. He conceived, that according to the law laid down by the court, he could have no means of satisfying either the court or the jury that the allegation, deemed so calumnious, was perfectly true.—Saith, that under these considerations deponent thought it more advisable for himself, as well as more respectful towards this honourable court, to let judgment go by default, and to reserve his justification for the day upon which he should be brought up for judgment, when he understood that any testimony as to the truth of the alledged libel, and as to the vindication of his conduct, would be fully admissible. But, in letting judgment go by default, deponent solemnly declares, that he was in no degree actuated by any consciousness of guilt; for he neither at that time felt, nor at the present feels, that any guilt attaches to his conduct with regard to the alledged libel; because he conceived when he wrote it—as he still conceives, every line in that production perfectly justifiable: he declares, that every statement it contains as of his own knowledge he knows to be true; that every statement it contains, founded upon the representation of others, he believes to be true; and that every opinion it expresses, he conceives to be perfectly just:—That, therefore, under all the circumstances hereinafter stated, he thought himself fully warrantable in publishing the said production. But in so publishing it, he most solemnly deposes that he had no intention to violate the law; to write a libel, or to do any thing criminal. To guard, indeed, against any such violation, deponent took every precaution in his power, having consulted an eminent barrister as to the purport of the alledged libel, before he sent it to the Morning Chronicle office for insertion, and had the opinion of the said barrister, that it contained nothing libellous; and having also particularly requested Mr. Perry, before he inserted the said alledged libel, to look over it with care, and to expunge any thing libellous it should appear to him to contain. Deponent therefore submits to this honourable court, that as guilt consists in the intention, no degree of guilt is fairly imputable to him. Saith, that in the said indictment it is averred in substance—First “That deponent is a person of a malicious and ill-disposed mind.” Secondly, That “he unlawfully intended to bring the character of the said Robert into public hatred and contempt.” Thirdly, That he accused the said Robert of “making use of his authority, as secretary of state, to aggrieve, harass, and oppress him, the said deponent.” And, fourthly, That he charged the said Robert with “having been guilty of tyranny, cruelty, and oppression, in his administration of the government of Ireland.” With regard to the first averment, deponent solemnly declares, that he is not conscious of having ever done or attempted to do ill to any good man, or to any good principle; and that he has never evinced or entertained any objections against the said Robert, but such as, according to the fair conviction of his mind, the conduct and character of the said Robert appeared to deserve. As to the second averment, deponent repeats his declaration that he did not intend to act unlawfully in publishing the letter recited in the said indictment. Nor is he conscious of having ever in the course of his life intentionally vio-

lated any law of this realm. If public hatred and contempt attach to the said Robert, deponent submits to this honourable court, that such hatred and contempt is not the consequence of the said alledged libel, but of the said Robert's own conduct, not only towards deponent, but in a variety of other instances as hereinafter related. Saith, that with regard to the third averment, deponent refers this honourable court to the order recited in the alledged libel, for preventing deponent from going to Walcheren, which order deponent submits to be an unequivocal indication of personal malice and ill-will, which from a variety of circumstances deponent is fully persuaded that the said Robert entertains, and has for years entertained, against him. Deponent has endeavoured in vain to obtain an affidavit from Sir Richard Strachan, upon the circumstances connected with this extraordinary order. For this purpose he applied to that officer in the month of November last, when Sir Richard stated, that he could not precisely recollect his words at such a distance of time, and assured deponent that he (Sir Richard) had, after his conversation with deponent at Walcheren, used his influence with the superior officers to mitigate the prejudice which the said order was calculated to produce against him, (the deponent,) but he refused to make any affidavit for deponent, observing, as deponent understood him, that "if he (Sir Richard) made any such affidavit, it might injure him, as he might be considered as of his (deponent's) party." That from this observation, and the reluctance manifested by other persons, to whom deponent has made a similar application, deponent has to lament the existence of a prejudice which stands in the way of that justificatory evidence which, if he could legally employ any compulsory process, he has no doubt of being able to obtain, with respect to the irritating conduct and the malicious disposition which the said Robert has uniformly betrayed, and the slanderous terms in which the said Robert has frequently expressed himself against the character and views of deponent. Deponent has, indeed, frequently heard, and verily believes, that the said Robert has been, and still continues to be, in the habit of representing him (the deponent) to have been involved in a treasonable conspiracy in Ireland, which representation deponent solemnly declares to be as false as it is malicious, deponent never having entertained any other political principles than those of the British constitution, administered in its purity; than those which the said Robert publicly professed and actively supported; for a great part of his life; the said Robert having, at the public hustings in Downpatrick, when offering himself as candidate to represent the county of Down on his first election, taken and subscribed a solemn test (of which deponent has an authentic copy)* that he (the said Robert) would, among a variety of other popular measures, both

* *From the Belfast News-letter, June 4, 1790 (No. 5,502.)*

"We are desired and authorized to inform the public, through the medium of this paper, that at the commencement of the election for the county of Down, on Saturday last, the following Test (which, with the signatures of the Hon. Edward Ward and the Hon. Robert Stewart, is left at this office) was proposed by a very respectable Gentleman to three of the Candidates: that the Hon.

in and out of parliament, "with all his abilities and influence, promote the success of a bill for amending the representation of the people."

But to return to the said order of Sir Richard Strachan, recited in the said alledged libel, deponent recollects that Sir Vicary Gibbs, as advocate for the said Robert, on the prosecution of John Gale Jones, admitted that a similar order was issued by the said Robert to Lord Ghatham. That such order betrayed a slanderous, a malicious, and a cruel purpose, deponent most sensibly feels—because it subjected deponent's character to the most injurious imputation—because it put deponent's life and liberty in a state of peril, as particularly appears from the annexed affidavit of Mr. Power—because it held forth deponent to the army and navy as a spy and a traitor—while his object in going to Walcheren was solely that which is stated in the said alledged libel—That deponent was invited by Sir Home Popham to accompany the said expedition, as appears from the following extract of a letter from that officer to deponent, dated Deal, July 20, 1809. "Dear Sir, You are aware, I am sure, that my motive in your going, was, that from the pen of an able writer the country might be informed of the importance of the expedition, and that it might be furnished with a faithful narrative of all the operations; I had no other view."—Deponent solemnly declares, that he had no other view on this occasion than that described by this officer and in the said alledged libel—and such was his resolution to write a faithful and impartial narrative of the expedition, that when it was proposed to him, before he (de-

Edward Ward and the Hon. Robert Stewart signed the same as underneath, and that Lord Hillsborough refused it:—

"We will rigidly attend our duty in parliament, and be governed by the instructions of our constituents; we will, in and out of the house, with all our abilities and influence, promote the success of A Bill for amending the representation of the people:

"A Bill for preventing pensioners from sitting in parliament, or such placemen as cannot sit in the British House of Commons;

"A Bill for limiting the number of placemen and pensioners, and the amount of pensions;

"A Bill for preventing revenue officers from voting at or interfering at elections;

"A Bill for rendering the servants of the crown of Ireland responsible for the expenditure of the public money;

"A Bill to protect the personal safety of the subject against arbitrary and excessive bail, and against the stretching of the power of attachment beyond the limits of the constitution; and we will, as far as in us lies, prevent any renewal of the Police Act.

(Signed)

"EDWARD WARD.

"ROBERT STEWART."

In the *News-letter* of same date is an advertisement, To the Electors of the County of Down, in which the following expressions are made use of:

"We are embarked in a much more interesting and glorious cause than our success as individuals—we are called forth as instruments in your hands to emancipate the country.

(Signed)

"EDWARD WARD.

"ROBERT STEWART."

ponent) landed at Walcheren, to write to Lord Chatham and Sir Richard Strachan, "requesting their favour, and promising not to publish any thing upon the subject of the expedition without their previous revisal," deponent rejected the proposition because it appeared to him inconsistent with that course of independence and impartiality which he was determined to follow. Deponent has in his possession the letters which contained this proposition, and for the justification of his conduct while at Walcheren, deponent can refer to the pages of the Morning Chronicle, in which all the letters he wrote from that island were inserted. The pecuniary loss which deponent suffered in consequence of the said order, he declares to have considerably affected his humble circumstances. Independently of the necessary expenses he incurred by the voyage, deponent was deprived of the prospect of a certain and material gain. For, from the general interest excited by the expedition to Walcheren—from the degree of public curiosity which prevailed with regard to its conduct and termination—from the industry which he meant to employ in collecting materials—from the superior opportunities of information which he had reason to calculate upon, if it were not for the prejudice excited against him by the said order, which rendered him unable to accomplish his object, deponent is fully satisfied that he would have derived five hundred pounds at least from the publication of a narrative of the said expedition. In consequence of these losses, and the injury which he, upon his return from Walcheren, found that his character had sustained by the publicity of the said order, which order deponent saw in a periodical publication of some notoriety, and generally conceived to be under the influence of the said Robert and his colleagues, actually attributed to the suspicions entertained of deponent's treasonable views, deponent intended to bring an action against the said Robert, whom he thought, and still thinks, the main cause of the said order. He was advised to indict the said Robert for a libel, but as the vindication of character and not the gratification of resentment was the object of deponent, he could not be reconciled to that mode of proceeding. But feeling inclined to bring an action, which would have afforded the said Robert a full and fair opportunity of justification, deponent consulted Mr. Clifford upon the subject, from whom he learned that there was no probability of his obtaining any redress against the said Robert by such a measure, and he thought it therefore unavailing to resort to it. Thus situated,—his character publicly stigmatized, he felt that he had no other resource for his own vindication than the appeal to the public which forms the alledged libel.

That deponent was the more determined to adopt this proceeding, from the peculiar circumstances connected with the said order—for, had it been merely the object of the said Robert to prevent deponent from going to Walcheren, he or his colleagues could have easily accomplished that object; because the place where deponent then was, and from whence he was about to sail, (namely, from Woolwich,) being known to Sir Home Popham, to Colonel Congreve, and to several other persons, with whom ministers and their agents had at that time opportu-

nities of daily communication, the departure of deponent; which really did not take place for a few days after the said order was issued, could have been effectually prohibited, without the public proclamation of his name to the whole of the immense fleet and army which were then assembled in the Downs. For deponent solemnly declares, that if it had been intimated to him that government wished to prevent him from going to Walcheren, he would have immediately abandoned his intention, well knowing that, against such wishes, the object of his voyage would have been impracticable. But deponent has many reasons for believing, and does verily believe, that the main object of the said order was to malign his character, to harass, aggrieve, and injure him; to place his liberty and life in peril; which he is the more fully disposed to think from his knowledge of the personal hostility and general character of the said Robert, and also from information which he received at Middleburgh; which information he verily believes, that a certain noble lord, who is nearly connected with the said Robert, did, at a public hotel in the said city, express himself in these terms, in the hearing of several military officers, "I wish some one would shoot that fellow (meaning deponent) out of the way at once." Saith, that with respect to the fourth averment in the said indictment, namely, the charge of tyranny, cruelty, and oppression, upon the said Robert's administration of the Irish government; deponent knows, that the said tyranny, cruelty, and oppression, did take place against deponent himself, and against several other persons, particularly in the months of April, May, and June, 1798. Deponent understands, and verily believes, that the said Robert was generally the adviser, and uniformly the advocate of the whole administration of Lord Camden, of whose privy council the said Robert was a confidential, and usually an attending member, upon the consideration of such subjects, as according to deponent's understanding and belief, are submitted to what is called the cabinet council in this country. Deponent recollects the said Robert to have uniformly, and without any variation, supported by his vote and influence, both in and out of parliament, the entire conduct of the said Lord Camden's government, under whose government took place the execution of William Orr, and the trial and imprisonment of deponent. Indeed the weight and influence of the said Robert was so great in the said government, as to be deemed paramount to that of the viceroy himself, as deponent has heard and believes. In addition to the circumstances stated in the said alleged libel with regard to the case of William Orr, deponent saith that he has heard and verily believes, that the jury by whom Orr was tried, remained in the jury-room throughout the whole of the night of the day upon which the said trial took place, and that when they presented their verdict in the morning, several of the jurors appeared quite stupified. That soon after the said verdict was pronounced, affidavits were made before the judge who tried the cause, of which affidavits the following are true copies, as deponent is informed and believes.

Lord Ellenborough. What, are we to go into these affidavits?

Mr. Finnerty observed, that it was stated as a fact in the al-

ledged libel, that these affidavits were made; and he thought it proper to verify that statement. The affidavits were not long.

Mr. Justice Le Blanc. The affidavit is altogether too long.

Lord Ellenborough. No matter, long or short, we will hear it: Go on.

The Clerk accordingly proceeded.

"Arthur Johnston, and Archibald Tompson, two of the jury who were empannelled to try William Orr, depose on the holy Evangelists, and say, that after they had retired to their jury-room to consider their verdict, two bottles of very strong whiskey spirits were conveyed into their jury-room through the window thereof, and given to, and the greater part thereof drank by the said jurors, some of whom became very sick and unwell, which occasioned their vomiting before they gave their verdict. And deponent, Tompson, says, that he was, by age and infirmity, and intimidation used to him by Mr. James McNeighton, one of the said jury, induced to concur in said verdict, contrary to his opinion.

"Sworn before me, this 20th of Sept. 1797, in Court,
"YELVERTON."

"ARTHUR JOHNSTON, ARCH. TOMPSON.

"George Crooks, of Innischcloughlin, in the county of Antrim, farmer, maketh oath and saith, that he, this deponent, was one of the jury who was on the trial of William Orr, who was charged with administering oaths. Deponent saith, he was resolved to acquit the same William Orr, but for the representations of some of his fellow-jurors, who informed this deponent, that in case they, the said jury, should return a verdict of guilty, the said William Orr would not be punished with death. Deponent further saith, that if he had at that time known that the consequence of returning a verdict of guilty on the said William Orr, would be punishable with death, he, this deponent, in that case, would not have consented to such a verdict, but would have insisted and persevered in returning a verdict of the said William Orr's not being guilty.

"Sworn before me, this 20th of Sept. 1797, in Court,
"YELVERTON."

"GEORGE CROOKS.

And deponent further saith, that although Sir Vicary Gibbs stated, as deponent understood him upon the trial of John Gale Jones, that the said judge (Lord Yelverton) who has been dead for some time, did refuse to recommend the said William Orr to mercy.*

* Mr. F. here referred to a letter addressed by the said judge, to the late bishop of Down and Connor, in the course of the period which intervened between the sentence and execution of William Orr, of which letter the following is a copy:

"My Dear Lord,

"I am sorry to inform you that the fate of Orr is no longer in my hands. Before the arrival of Doctor Macartney this morning, the Lord-

Lord Ellenborough. We cannot allow this kind of reference to another trial.—Pass that by.

But deponent saith, that the said Robert having been appointed first secretary to the Lord-Lieutenant of Ireland, about the beginning of April, one thousand seven hundred and ninety-eight, and having for a considerable time before acted as *locum tenens* for Mr. Pelham (now Lord Chichester) which said office of first secretary was, in point of authority and influence, tantamount to what is called that of “prime minister” in this country, deponent has, independently of the case of the said William Orr, heard of various cases which he fully believes, and which serve still more directly and conclusively to prove the practice of tyranny, oppression, and cruelty, under the government of the said Robert, as will appear by divers affidavits which will be read to your lordships: deponent is in possession of an affidavit made by Bryan O'Connor, medical doctor of Bantry, in the county of Cork, Ireland, before a magistrate of that county, which affidavit deponent understands cannot, from a certain informality, be admitted in this court, but which affidavit recites—

Lord Ellenborough. We cannot allow an affidavit of this nature, which would not be admissible by the court, to be introduced in this form.

Mr. Finnerty. The informality alluded to is simply this, that there are some blanks and interlineations in the affidavit, to which the initials of the magistrate before whom it purports to have been sworn, are not annexed, and therefore it could not be regularly presented to this court. But having no doubt of the veracity of the statements it contains, I have introduced them into my own affidavit.

Lord Ellenborough. We cannot receive them. Pass that by.

The Clerk read on until he came to the case of Mr. Thomas Braughall, a merchant of Dublin, who was arrested in May, 1798, upon the warrant of Lord Castlereagh. But the deponent making this statement upon hearsay, the court interfered and refused to hear it.

Mr. Finnerty expressed a hope, that as the court had by their own decision on the motion for postponing his trial, placed him in such a situation that he could not avail himself of any compul-

Lieutenant had determined that the law should take its course, and though the Doctor had brought with him such documents as (if laid before the jury) might very probably have induced them to acquit him, yet I fear they are come too late. I have, however, recommended, upon the credit of them, a respite for a week, to give further time for investigation. Whether it will have the desired effect or not, is more than I can take upon me to determine, but I hope your lordship will do me the justice to believe, that your feeling any interest in the subject, makes me more than usually anxious that it should.

“I have the honour to be, with the most sincere esteem and respect, my lord, your lordship's most faithful and obedient servant,

“YELVERTON.”

story process for the collection of evidence, but must depend upon voluntary affidavits, they would not in equity bar his production of the best means of justification which he was under such circumstances enabled to obtain. He stated, that he had had this communication respecting Mr. Braughall, who had been some years dead, from an intimate friend of that gentleman's, corroborated by a letter in Mr. Braughall's own writing. The case was this, that Mr. B. who was at the time about 70 years of age, was arrested in May, 1798, and upon the warrant of Lord Castlereagh, committed to Kilmainham jail, where he was confined for two nights in a common cell, without bedding or any accommodation whatever; that he was imprisoned for six months, and then discharged, without having had any trial; although he had, in the course of his imprisonment, and after his liberation, frequently solicited a trial for the vindication of his character; which treatment was conceived to have accelerated his death. Further, this gentleman's house was, upon the day of his arrest, robbed by a military party, of property to a considerable amount, which had never since been restored. The case of Mr. Braughall alone Mr. F. thought sufficiently conclusive evidence as to the nature of Lord Castlereagh's government in Ireland; and as a justification of the charges which he (Finnerty) had pronounced against that government.

Lord Ellenborough. We are not here to enter into a trial of Lord Castlereagh's government in Ireland.

Mr. Finnerty. My lord, my prosecutor accuses me of a libel, and solicits you to inflict punishment upon me for attributing misconduct, as I admit, to his administration of the government of Ireland. How then am I to repel his accusation; how am I to avert or mitigate your punishment; how am I to justify myself, but by proving the truth of what I have written, which, according to long established practice, it is competent to me to do in this stage of the proceeding; and how is it possible for me to prove that truth without entering into a consideration of what the conduct of my prosecutor's government was. You will recollect, my lord, that this case was brought before the court by my prosecutor; that he is the accuser; that he it is who challenges the investigation of that government. You will also recollect the circumstances of the case, according to which I have regulated my whole course of proceeding. I have not felt it necessary to refer to much law upon the present occasion; for I have found a case of very recent date, which sufficiently answers, which is precisely applicable to my purpose; I mean the case of Colonel Draper. In that case the defendant (Draper) was accused of a libel upon Colonel Fullarton, and he let judgment go by default. But upon being brought up for judgment, he produced several affidavits to prove the truth of the allegations contained in the libel. Nay, in

his own affidavit Draper went far beyond the original libel, which only attributed embezzlement to Colonel Fullarton; for he charged the Colonel with forgery, and that upon inference only. His affidavit contained a variety of other new charges, and also much irrelevant matter; yet it was heard without interruption, and placed upon the file. And the opinion of your lordship was, that as there appeared to have been a great deal of irritation between the parties, the better way was to let the controversy terminate, and to hold Draper to bail. Such, my lord, was your decision, even after a variety of the allegations in Draper's affidavit were contradicted by counter-affidavits. Now I have framed my affidavit quite according to the model of Draper's, excepting only any irrelevancy of matter, from which I have cautiously abstained. Let me hope, then, that the same measure of justice which your lordship thought proper to grant to the advocate of a man* confessedly guilty of ordering the infliction of torture, you will not refuse to one whose only offence is the reprobation of torture. Having drawn up my affidavit myself, I trust your lordship will not allow any mere technical objection to be pressed against its admissibility.

Mr. Justice Bailey said that the court could not receive any affidavits as to facts not appearing on the face of the libel.

Mr. Finnerty observed that he had upon the face of the libel accused Lord Castlereagh of sanctioning torture in Ireland; and that he only offered affidavits of facts to substantiate that accusation, which he submitted he was entitled to do, according to the uniform practice of the court.

Mr. Justice Bailey. You cannot prove a general charge by particular facts.

Mr. Finnerty. Pray, my lord, how else am I to prove it?—*Mr. F.* was proceeding, when *Lord Ellenborough* interfered, and observed that the court would not be replied upon.

Mr. Garrow now felt himself called upon to interfere. He regretted the absence, from indisposition, of the attorney-general, who would have conducted this prosecution so much more ably; and he had been desired by that advocate to give the defendant every reasonable lenity. He now thought, however, that the court were placed in a situation from which one day or another the public justice might suffer. The defendant disclaimed counsel, and therefore every allowance was made to him; but if such an affidavit as the present had been put in by any gentleman at the bar, the learned counsel did not hesitate to say, that it would not have been suffered to remain on the files of the court. Was

* Governor Picton, and the story of Louisa Calderon is well known to the public.

the defendant; then, upon the ground of appearing without counsel, to accumulate libel, not only upon the prosecutor, but upon every person whom his fancy might suggest to him? This mischief, their lordships would observe, was not cured by merely desiring the officer to pass by the improper passages of the affidavit—the whole affidavit was on the file; and it was thus in the power of the defendant, or of any body else, to give the whole as a document upon the record of the King's Bench court. Thus it might be published with impunity. The defendant's affidavit was a more aggravated injury than that of which Lord Castlereagh complained.

Mr. Finnerty complained of the learned counsel's insinuation, which was calculated to make an impression to his prejudice, by imputing to him motives different from those he professed.—The learned counsel's insinuation was in fact neither creditable to his liberality, nor consistent with truth. All his view, by his affidavit, was the verification of the alledged libel—every line of which was true—was perfectly justifiable. As to the pretence of injury to Lord Castlereagh, it is quite preposterous, said *Mr. Finnerty*. What! that he who has slandered my character—who has put my life and liberty in peril, shall charge me with injuring him, because I have ventured to complain. I am the injured party, for I have, through the conduct, of Lord Castlereagh, experienced such injury and suffering, as would have goaded another man into madness, or sunk him into the grave. I should, in fact, be, on this occasion, rather the accuser than the accused.

Lord Ellenborough observed that the affidavit went far beyond what it should have done. It went, indeed, as had been stated, to add fresh libels to those already promulgated. The court, therefore, agreed in the soundness of the objection taken by the counsel. But if the defendant pleased, he might retract the affidavit he had presented, and come up at a future day with another free from such exceptions.

Mr. Finnerty. It appears to me impossible to tender any affidavit in proof of the truth of a libel, without being liable to the exceptions now alledged with regard to the promulgation of fresh libels: for if A charge B with cruelty, and A for that charge be indicted for a libel, how can A, upon being brought up for judgment, adduce any facts to prove the truth of the charge against B, without being exposed to the animadversion now urged against me. However, I have no objection to accept the proposition of the court, and to withdraw my affidavit. But in order to guard against any further altercation, I should like to know to whose advice it would be desirable for me to resort, or what course I ought to take.

Lord Ellenborough. The court cannot advise parties; that

would be exceeding the line of its duty: but, added his lordship, you had better take other advice than you did when you were told that your publication was not a libel.

Mr. Finnerty. I will avail myself of the opportunity which the court has thought proper to afford me, and I thank your lordships for the consideration which this proceeding appears to manifest.

Lord Ellenborough expressed his expectation that the affidavit which he should next bring up, would be one rather to do him good than harm, as the court felt no pleasure in dispensing punishments.

Mr. Garrow disclaimed any such intention as that which had been attributed to him by *Mr. Finnerty*, with whom he did not wish to enter into any altercation.—He had merely stated, that the conduct which he had described, might be pursued by any other person or in any other case; but he by no means intended to impute any evil design to the defendant.

The affidavit was then returned to *Mr. Finnerty*, and he was ordered to be brought into court again on Thursday next.

Thursday, February 7.

The Attorney-General prayed the judgment of the court against *Mr. Finnerty*.

Mr. Finnerty. In compliance with your lordships' proposition, I have revised the affidavit which I presented on Thursday last, and I have omitted, not only the passages to which your lordships expressly objected, but also those to which the principle of your objection appeared to me in any degree applicable: this I thought due in deference to your lordships' opinion. If, notwithstanding the care I have taken, assisted by a diligent review of the affidavit in *Draper's* case, by which I have shaped my course, there should still remain any thing in this affidavit inconsistent with your lordships' opinion, or even disagreeable to your wishes, I shall feel the most sincere regret, because it is not more my interest than my inclination, to conciliate your lordships. There is no sacrifice, indeed, that can be consistently required, to which I am not disposed to submit, in order to conform to your lordships' judgment, 'satisfied that you would not require of me, standing here as a prisoner before you, any sacrifice inconsistent with a due regard to integrity and character. With regard to the remarks of the learned counsel—

Court. You cannot go into that now; let the affidavit be read first.

Mr. Finnerty. Shall I, to save your lordships' time, point out the place to which the affidavit had been read, before it was interrupted by the court.

Lord Ellenborough. No. Let the clerk read it from the commencement. I desired you to bring a new and inoffensive affidavit : I hope you have taken my well-meant advice.

Mr. Finnerty. I have endeavoured to follow your advice as well as I could understand it.

The Clerk proceeded in the reading of the affidavit until he came to that part which affirmed the truth of the original libel, with regard to the alleged misconduct of Lord Castlereagh towards deponent.

Lord Ellenborough. I will not listen to this. You were warned to amend your affidavit by this day ; to bring up a proper affidavit. You have come here, however, without appearing to have profited by our advice or indulgence. I hope, sir, you come in the proper spirit to mitigate a crime of which you have confessed yourself guilty.

Mr. Finnerty. I have, I hope, come here to-day in a proper spirit. I have come here, however, under no consciousness of guilt ; and I must, with all deference, be allowed to deny that I have confessed any crime. It is true that I have let judgment go by default, but let the causes of that proceeding be borne in mind, which are stated in that part of the affidavit your lordships have allowed to be read. While the doctrine is held that truth is a libel, *non constat*, that a man who confesses he has written a libel, confesses that he has committed a crime. What does the court require of me? What! was it calculated that any time or consideration would induce me to compromise my character—that I would cry *peccavi* where I had not sinned—that I would make concession or apology where I had done no wrong—that I would consent to prostrate myself in this court? What a mistaken calculation! How little they know of me who could entertain such an idea.—That part of the affidavit to which your lordships have now thought proper to object, you allowed to be read on Thursday last without any interruption or symptom of disapprobation whatever. Indeed, you did not interpose until the clerk came to Dr. O'Connor's case. What your lordships did object to has been expunged. I have used my utmost endeavour to shape the affidavit according to your recommendation, and if I have not succeeded, I hope you will attribute my failure to its real cause, namely, my inability precisely to understand your lordships' wish : of my sincerity your lordships will be able to judge, when I state, as you may see, that I have expunged nearly one half of the former affidavit, and have suffered that only to remain to which no objection was made.

Lord Ellenborough. Hand the affidavit back to him ; we reject it. Sir, you got very indulgent advice from us, and you have rejected it; you must take the consequence.

Mr. Finnerty. I request you to reconsider, that your lord-

ships made no objection to this part on a former day, and that misled me: I am willing, however, to have the affidavit referred to any person whom you may think proper to appoint, in order to have it framed unexceptionably. I am tenacious only of the facts necessary to my own justification.

Court.—No, sir, the court will not hear of a referee.

Mr. Finnerty. Will you then allow me time to consider the affidavit further, and have it re-cast with a view to your lordships' wishes.

Court. No.

Mr. Finnerty. Will you until to-morrow.

Lord Ellenborough. No. We are not to wait here until you condescend to conform to the law: you were told by me that the affidavit you presented was improper; yet you have persisted. If you have any unexceptionable affidavits which may do you good, we will hear them.

Mr. Finnerty. What can or ought to do me more good than an affidavit to the truth of the original libel, showing the extreme irritation and ill-treatment I have experienced from my prosecutor; showing, in fact, that he is the aggressor on this occasion, although he now solicits you to punish me for complaining. Such is the affidavit now before you; and am I, for one error or exceptionable passage, to be deprived of the benefit of this most important affidavit. I have drawn it up exactly according to the precedent in Draper's case, keeping in view your lordships' recommendation. I must again request that my affidavit may be read.

Lord Ellenborough. Sir, your pertinacity shall not influence us. There may be a thousand distinctions between Draper's case and this.

Mr. Finnerty. I cannot see one distinction; and I am prepared to contend that there is not one which does not make in favour of the course I am pursuing. I have not introduced any irrelevant matter, as Colonel Draper did. That officer alledged many things in his affidavit with regard to Col. Fullarton, which were not at all stated or alluded to in the production for which he was prosecuted. I have not gone through any part of the conduct of Lord Castlereagh but that which is specifically adverted to in the original libel; therefore the instances of my deviation from the precedent of Draper serve only to strengthen my claim for the admission of this affidavit. I am really at a loss to know upon what grounds your lordships are resolved to act with respect to my case. Is it not according to the uniform practice of this court, admissible, on the part of a person in my situation, when brought up for judgment, to produce affidavits in proof of the truth of the original libel? I propose to do that, and nothing more. Upon what principle will your lordships refuse me that

right and those means of justification which are invariably allowed to others? (*a pause*) Mr. F. resumed:—Then be it so, I see your decision is against me, and I must submit to the misfortune. Here are some affidavits which are perhaps admissible.

The affidavit of David Power, Esq. who was a volunteer with the army at Walcheren, was then read.—Deponent stated the prejudice excited against Mr. Finnerty, and the imminent peril in which his life and liberty were placed, in consequence of the order mentioned in the original libel, to have originated from Lord Castlereagh, whom deponent saw at Deal when the order was issued. The affidavit of Dr. Lipscomb was also read, in which the Doctor deposed, that he attended Mr. Finnerty in November last, when the life of Mr. F. was in extreme danger, and that he was not yet recovered.

Mr. Finnerty. When I last appeared here, the first interruption I experienced was from the informality of Dr. O'Connor's affidavit; providentially I have received a more correct one since from Bandon; I now offer it.

The Court. Who is this O'Connor?

Mr. Finnerty. He is a gentleman of respectability, who was, in the year 1799, transported to Botany Bay, where he remained nine years, upon the mere warrant of Lord Castlereagh.

Lord Ellenborough. I reject this.

Mr. Finnerty. I must again request to know upon what principle your lordships mean to proceed towards me. The truth of a libel has been uniformly held by this court to extenuate its guilt, and has always served to mitigate the punishment. Now either you believe the libel for which I appear before you, to be true, or you do not. If the former, and that you will deal with me accordingly, you may reject this affidavit: I have no objection. But if the latter, how can you consistently exclude me from the opportunity, or deny me the right of producing such evidence as must remove your disbelief—as must do away even any apology for scepticism—as must convince you that I do not deserve punishment for censuring such a man. If you do not believe Lord Castlereagh guilty to the extent that I have stated in the alledged libel, I pledge myself to produce—indeed I have here before me, a host of affidavits,* confirming, on his part, atrocities so enormous, as no man can hear without invoking the throne of justice for vengeance on his head. This court has not acted upon such a principle: Lord Mansfield refused an information in General Plastoe's case, in consequence of the character of that officer, and because the statement complained of was true.

* All these affidavits were sworn, we understand, before Lord Norbury, Chief Justice of the Common Pleas, in Ireland; Mr. Justice Mayne, of the same court, and Justices Daly and Day, of the court of King's Bench.

I offer this affidavit to prove that every word in my publication is true.

The Court. We will not hear it.

Mr. Finnerty. Here, then, is the affidavit of Mr. Clare.

The Court. Who is Clare?

Mr. Finnerty. The affidavit will tell that. The description will take up as much time as the reading. It has been sworn before a judge of the King's Bench in Ireland.

Mr. Clare's affidavit stated, that in the year 1798, various kinds of torture, such as whippings, picketings, half hangings, &c. &c. were practised in Dublin, close to the castle gate. He swore also that Lord Castlereagh might have heard the cries of the sufferers in his office.

The Court. Can it be endured, that such affidavits as this are to be put in when we have expressed our determination on the subject, and given our advice?

Mr. Garrow. Certainly, my lord, it ought not to be tolerated; he is only uttering fresh libels. You have given this man eight days to amend his affidavit, and he has chosen to remain obstinate.

Mr. Finnerty. That is a harsh observation. But if they had given you eight years to amend your manners, you would still retain your *marked liberality*. As to the charge of uttering fresh libels, it is remarkable that the very same objection was urged without effect, by the very same counsel, against Draper's affidavit, for there the learned gentleman was Fullarton's advocate. I have, however, a few observations to submit upon the nature of this objection, to which I beg the attention of the court. According to the practice of this court no evidence as to the truth of a libel is admissible upon the trial, because it is held that truth is no justification of a libel; but such evidence is admissible upon the defendant's being brought up for judgment, because it is held that truth is an extenuation of the guilt of a libel. A libel is deemed an offence against the law, because it gives pain to the party libelled, and so may provoke himself, or his friends, to a breach of the peace. Now any evidence which serves to substantiate the truth of the libel, must naturally aggravate that pain. So that it is impossible to adduce any evidence to the truth of the original libel, without aggravating the offence, as against the party libelled, and being liable to this charge of uttering fresh libels, although the adduction of such evidence is not only allowable, but necessary, to mitigate the offence as against the law. This distinction does not appear to have been present to the mind of the learned counsel, when he made the objection to which I have alluded. The contradiction and absurdity, however, which belongs to the whole of this extraordinary law, renders the confusion of the learned gentleman's ideas

somewhat excusable. But if his objection had any weight, it would operate entirely against the production of any affidavits in a case of this nature, with a view to the truth of a publication and the consequent mitigation of punishment, for no man could, under that objection, bring forward facts to prove that his original statement was true. No innocent man can be subjected to any grievance by the production of affidavits to the truth of any statement in a case of this nature, and for the protection and vindication of innocence alone can the law of England be solicitous. I do not desire to reproach, or even to impeach innocence. No, quite the contrary. My object is to justify my own conduct, to do that which the law allowed, and for that purpose I tender this affidavit.

The Court. Have you, sir, any inoffensive affidavits?

Mr. Finnerty. None that are inoffensive with regard to Lord Castlereagh, and none that are offensive, as I conceive, with regard to the law or to this court. In consequence of your lordships' *dictum*, that truth was no justification of a libel, and that therefore I should not be allowed to prove the truth of my letter, I let judgment go by default: I did so, because I understood that on being brought up for judgment, I might produce the truth in mitigation. This, was no idle fancy of my own; it was built upon your precedents and practice. Since your law was against me, I have deferred to it; but nothing on earth shall induce me to make any submission to Lord Castlereagh. No, no, my lords, remember your own words in the case of Jones: "*You have thought fit to charge his lordship with acting in that high office from motives of personal ill-will towards a private individual, and with having made use of his authority and influence, as secretary of state, to harass and oppress such individual, in such a way, as, if true, would not only render him unfit to fill that high station in which he had been placed, but would prove him so base an individual, that no gentleman could associate with him.*"—This was the language of your lordship, addressed to Mr. Jones, when pronouncing sentence upon him for a libel upon Lord Castlereagh, in consequence of my letter. Now I am ready to prove that Castlereagh does deserve the description, which your lordship charges me with applying to him, of being the basest of individuals. And will you then punish me for censuring the conduct of such a man?

The Court.—We cannot hear this. You may now utter fresh libels against Lord Castlereagh, which he can have no opportunity of rebutting.

Mr. Finnerty. I thought I had fully obviated this objection about "fresh libels." But, in fact, Lord Castlereagh has an opportunity of rebutting my "fresh libels" as you term them; for he can, as was done in Draper's case, put in counter affidavits, if in his

power to produce them. Nay, more; he will, by the admission of my affidavits, be afforded the opportunity, not only of repelling the charges contained in these affidavits, but of punishing for perjury those by whom the charges are made, if such charges are unfounded. Thus, if you receive my affidavits, the noble lord will have the means, not only of vindicating his own character, but of exhibiting his accusers to universal infamy. Do, then, in justice to Castlereagh, as well as in justice to me, allow these affidavits to be read. I have shown you, that if they are false, they can produce no evil but to those with whom they originate; and if they are true, I ask you, in the name of all that is sacred, how can you reconcile it to your conscience to send me to a jail for uttering the truth against such a man. Will you hear my affidavits?

Court. No, not if they are of the same nature as those which you have offered. They cannot plead in mitigation.

Mr. Finnerty. According to that remark, I am curious to know what your lordships mean by mitigation. I have always heard, as I have already repeatedly said, that to prove the truth of a libel was the mode of producing mitigation. I have understood that your lordships were not disposed to inflict the same punishment upon the writer of truth as upon the writer of falsehood; upon the censor of a bad as upon the censor of a good character; your lordships have uniformly allowed such evidence as I tender, to be admissible. The doctrine, indeed, of "the greater the truth the greater the libel," should impel you to admit evidence to the truth, in order that you should not punish truth and falsehood alike. However monstrous this conclusion may seem, it arises, as it has been well observed, out of the preposterous nature of this law. But I believe that this is not the law which, in its general latitude, you are in the habit of acting upon. I believe, that notwithstanding the doctrine of Coke, which made no distinction between the truth or falsehood of a libel, or between the good and bad character of the party libelled, a distinction upon either of these points would have its due influence upon your lordships' minds. In order, therefore, to ascertain whether any, and what is the degree of distinction as to truth and character which exists in this case, I call upon your lordships to hear my affidavits.

Lord Ellenborough. I said before that we should not receive any affidavits of the same character, and to the same purport as those you have already offered.

Mr. Finnerty. I will then state the purport of a few, and your lordships can receive or reject them as they proceed. I have here an affidavit of a father and son having been tortured side by side in Dublin, under Lord Castlereagh's government, in the year 1798. The affidavit is from the father. Will you allow it to be read.

The Court. No.

Mr. Finnerty. Here is another affidavit from a Mr. Hughes, whom Castlereagh saw one or two days after the torture had been inflicted; his back raw with the scourge; his shirt one mass of blood, and his coat hanging loosely around him.

The Court. Why, this is contumacy to the court.

Mr. Finnerty. I wish not to offer any contumacy: I desire not to repel your judgment, but to vindicate my own character. That character is dearer to me than life, and in comparison with its loss, any punishment within power's limits to inflict, has little terrors for me. I offer to prove the truth of all my statements. According to your law, I may be called a libeller, but if I had not these affidavits to produce, I might be called a liar also. The latter is an odious character in every state of society, but I do not know that in the present state of England, a libel upon a public man furnishes any presumptive evidence against the morality or judgment of the author.* I am, therefore, more anxious to rescue myself from the imputation of the one than of the other. Since the court does not think proper to hear the whole of the affidavit of Hughes, I will proceed to another.

Mr. Justice Le Blanc. Let the clerk read the affidavits, sir.

Mr. Dixon's affidavit stated, that he was a yeoman in 1798; that he saw three peasants whipped and tortured without trial.

The Court. What does this prove?

Mr. Finnerty. It goes on to state that these cruelties were committed with Castlereagh's sanction and privy.

The Court. You have been often told that these things were irrelevant. Do not compel us to send you back to prison till next term, in order that you may come here to receive our judgment in a becoming manner.

Mr. Finnerty. I cannot understand what is meant by irrelevancy. The tendency of this and all my affidavits, is to prove the truth of what I have written. I have been at very great trouble and expense to procure these affidavits. I went to Ireland for the purpose, and now offer them again, with the observation, that they do not contain one hundredth part of the atrocities which I could prove against this man. I have, however, sufficient for my purpose. Here they are, sworn before the judges of Ireland by honest men. I press them upon the court neither with presumption nor pertinacity, and I quote the case of Colonel Draper to justify my course. Not one word has been said to overthrow that case. Draper was allowed to prove every word. Draper offered affidavits afterwards, alleged to be false by different witnesses, yet they were heard;

* Certainly a libel cannot by any man, even the most prejudiced, be regarded as a *malum in se*.—"If it were not for libels," said the great Lord Camden, "we never should have had the glorious revolution."

he offered irrelevant affidavits, yet they were not interrupted. I here offer true and relevant affidavits, and I demand equal justice. I refer your lordships to no statute which you may construe at your discretion. I produce to you no *dicta* of those who have preceded you, and by which you are not bound; but I quote to you your own recorded act, in a case which occurred not two years since. Will you discard that precedent and reject my affidavits—will you punish me to gratify malignity, for that is the motive for my prosecution. If any thing were wanting to prove the vile malignity with which my enemy persecutes me, I have merely to mention, that on the very day when this court postponed the order for my appearance on account of ill health, the attorney of my prosecutor, accompanied by a Mr. Groom, who is the confidential friend of that prosecutor, called at my doctor's, by the authority, as they said, of the attorney-general, and under the pretext of inquiring after my health, used the most insulting observations. Thus, my prosecutor and his friends betrayed their regret that even the misfortune of sickness should have deferred the gratification of their wishes to commit me to a gaol. Let me again request your lordships to allow these affidavits to be read—consider, that if they are suppressed, my prosecutor is likely to stand convicted before the country; consider, that the suppression of such affidavits must speak volumes to every man of common sense in the country.

Lord Ellenborough. As you have no more admissible affidavits to produce, the court is now ready to hear any observations that are to be submitted to it upon the whole of the case.

Mr. Finnerty. Let the attorney-general begin. I have the privilege of replying in consequence of my letting judgment go by default.

Attorney-General. No; in the case of the King against Bunby, it was ruled that where no affidavits were produced on the part of the prosecution, the defendant was first to speak in mitigation, and the prosecutor to answer him.*

Mr. Finnerty. Lord Kenyon might have ruled it so; but I should suppose that your lordships will prefer the precedent which you have yourselves established. I allude to the case of Draper, where Mr. Garrow and Mr. Nolan spoke first for the prosecution, and then Mr. Serjeant Best rose for the defence, to reply, when the business terminated in consequence of the interposition of your lordships, who recommended, that as there was great irritation on both sides, Draper should be held to bail, and so the affair ended. I shall rest on Draper's case until it be controverted.

* This rule was in support of Mr. Finnerty's claim, as he had presented the affidavits of Dr. Lipscomb and Mr. Power. See preface.

Mr. Garrow. As there is nothing for the prosecutor to speak upon but the information, of course it must follow that the defendant should first speak, or else what can the prosecutor have to reply to.

Mr. Finnerty. To my affidavits and observations.—But are these two valiant champions afraid of being answered by me?

The Court. As to Draper's case, some irregularity may have crept in, perhaps, from the indifference of the counsel, or some other cause; but we cannot suffer that irregularity to contravene established usage.*

Mr. Finnerty. Will you declare it to be established usage, and against your own practice, merely because Lord Kenyon so ruled it. Have you any other authority for such a rule.

Mr. Clifford. My lord, the rule, as quoted by the attorney-general, only applies to cases where no affidavits were produced. Here two, those of Power and Lipscombe, have been read.

The Court. No, none on the part of the prosecution. Mr. Finnerty, now proceed.

Mr. Finnerty. I am well aware, my lords, of the many disadvantages under which I stand this day before you; but of none am I more sensible than of having unhappily squared my conduct by a decision, which until now acted upon, has been so suddenly rejected. I have also the misfortune to have that sworn testimony which I have offered, refused; and to hear charges made which it is not allowed to me to rebut. It may be against me, too, that I am denied the advantage of reply. I may be abused with scurrility—with venom. But I care not. Such attacks cannot affect me; for I have never in my life and conduct sunk so low as to come within the reach of any serpent's bite. I cannot, indeed, devise what the attorney-general may offer for his client. Perhaps, fertile in expedients, he may assert his innocence. In this he will but follow the example of the noble lord himself, who openly declared in his place in parliament, that he knew nothing of torture inflicted in Ireland.†

* The Court did not require to see the rule.

† In the course of a debate in the House of Commons upon the Irish Martial Law Bill, in the month of March, 1801, Lord Castlereagh, in consequence of an allusion to torture by Mr. M. A. Taylor, *distinctly avowed*, "that torture never was inflicted in Ireland with the knowledge, authority, or approbation, of government." But Mr. John Claudius Beresford, who was very competent to speak to the business, observed, that "*it was unmanly to deny torture, as it was notoriously practised*, in order to obtain confessions." Nay, more, but a few nights after this solemn declaration of Lord Castlereagh, Lord Clare, who was a colleague of Castlereagh in the Irish government, avowed torture in the House of Lords, and endeavoured to justify it by those old exploded arguments which have been so completely refuted by Beccaria—by arguments which are, in fact, as futile in the eye of reason, as they are horrible in the eye of humanity. What says Beccaria upon this subject? "To discover truth by this method, is a problem which may be better solved by a mathematician than a judge, and may be thus stated—the force of the muscles and the sensibility of

Such an effect had this hardy and unblushing declaration, that I well remember, when Mr. Dallas was defending the tortures of Picton in Trinidad, on the precedent of those inflicted in Ireland, the judge stopped him, by the assertion, that there was no punishment inflicted in that country but by court-martial. It is not for me, however, to anticipate the learned gentleman's

the nerves of an innocent person being given, it is required to find the degree of pain necessary to make him confess himself guilty of a given crime." But what said Blackstone.

"The trial by rack is utterly unknown to the law of England; though once, when the dukes of Exeter and Suffolk, and other ministers of Henry VI. had laid a design to introduce the civil law into this kingdom as the rule of government, for a beginning thereof, they erected a rack for torture; which was called in derision the duke of Exeter's daughter, and still remains in the tower of London: where it was occasionally used as an engine of state, not of law, more than once in the reign of Queen Elizabeth. But when, upon the assassination of Villiers, Duke of Buckingham, by Felton, it was proposed in the privy council to put the assassin to the rack, in order to discover his accomplices; the judges, being consulted, declared unanimously, to their own honour and the honour of the English law, that no such proceeding was allowable by the laws of England. It seems astonishing that this usage, of administering the torture, should be said to arise from a tenderness to the lives of men: and yet this is the reason given for its introduction in the civil law, and its subsequent adoption by the French and other foreign nations: viz. because the laws cannot endure that any man should die upon the evidence of a false, or even a single witness, and therefore contrived this method that innocence should manifest itself by a stout denial, or guilt by a plain confession. Thus rating a man's virtue by the hardness of his constitution, and his guilt by the sensibility of his nerves!—But there needs only to state accurately, in order most effectually to expose, this inhuman species of mercy, the uncertainty of which, as a test and criterion of truth, was long ago very elegantly pointed out by Tully: though he lived in a state wherein it was usual to torture slaves in order to furnish evidence: "*tamen*," says he, "*illa tormenta gubernat dolor, moderatur natura cujusque tum animi tum corporis, regit quæsitior, flectit libido, corrumpit spes, infirmat mæus; ut in tot rerum angustis nihil veritatis loci relinquatur.*"

Voltaire observes, that "there is a natural compassion in the human heart which makes all men detest the cruelty of torturing the accused in order to extort confession; the law has not condemned them, and yet, though uncertain of their crime, you inflict a punishment more horrible than that which they are to suffer when their guilt is confirmed.—"Possibly thou mayest be innocent, but I will torture thee that I may be satisfied, not that I intend to make thee any recompence for the thousand deaths which I have made thee suffer, in lieu of that which is preparing for thee." Who does not shudder at the idea. St. Augustine opposed such cruelty; the Romans tortured their slaves only; and Quintilian, recollecting that they were men, reproved the Romans for such want of humanity. If there were but one nation in the world which had abolished the use of torture, if in that nation crimes were no more frequent than in others; and if that nation be more enlightened and more flourishing since the abolition, its example surely were sufficient for the rest of the world.—England alone might instruct all other nations in this particular."

Upon the discussion of the measure before alluded to, namely the Irish martial law bill, what said Lord Ellenborough, who was then attorney-general. A proposition was submitted to insert a clause in the bill for prohibiting torture, and the noble lord opposed it, "because," said he, "it cannot but be known to every one, that neither martial law nor any other law human or divine, can justify its application or authorize its infliction."

Such are the authorities against that horrid practice which Mr. Finnerty was ready to prove, has disgraced our own times and empire.

speech—sufficient will it be for me to state the grounds of my own justification.

In appealing to the laws of England, I cannot doubt of a favourable result, when the questions for consideration are simply these:—whether a man who has suffered under great oppression and great calumny, shall be condemned to punishment, because he has ventured to complain of the author of that oppression—because he has endeavoured to vindicate himself against that calumny?—whether that first law of nature, which no law of any civilized nation has ever attempted to contravene—whether self-defence shall be deemed a crime?—whether a British subject shall be refused that which has been emphatically termed the last refuge of the unfortunate—namely, the right of complaint? When I had, my lords, determined to undertake myself the arduous task of addressing you on this occasion, I was naturally induced to calculate upon the same degree of indulgence that is due to persons in a similar situation. The indulgence, therefore, which I look for, cannot be regarded as extraordinary. All I ask is a fair, patient hearing, and pure, unmixed justice. Your lordships will consider, that my liberty, perhaps my life, may depend upon your decision. I have vital interests at stake; I have much to struggle for; but highly as I value the object, it would ill become a man of my sentiments and habits, to plead his own cause if there were no chance of obtaining the rights of justice without surrendering the rights of freedom—if there were no protection for innocence and integrity unless they appeared in the prostrate attitude of a sycophant and a slave. All that justice requires in England from any appellant, is a plain, clear exposition of the case, submitted to her consideration to ensure a decision correspondent to her character. That plain and clear exposition I will endeavour to lay before your lordships, and in doing so let me assure you, that it is my intention—that it is my earnest wish to abstain from any expression in the slightest degree inconsistent with the respect which is due to your lordships' high station. This assurance, let it be understood, proceeds from a strong sense of duty, and by no means from any apprehension of punishment. Indeed I feel no such apprehension, and this declaration will not, I hope, be attributed to any unbecoming confidence, but to an opinion which, I trust, is justifiable—that the last place on earth in which a man conscious of his innocence should feel any fear, is a British court of justice. When I speak of conscious innocence, it may be asked, why withdraw my plea—why let judgment go by default? I answer by referring to my affidavit. I did not let judgment go by default from any of the considerations which generally influence those who adopt such a proceeding. I neither meant to supplicate mercy, nor to confess guilt. No.—As to the former, I know Lord Castlereagh

too well, and respect myself too much, to make any appeal to his clemency. But, at the same time that I make this declaration, let it be distinctly understood, that if I thought I had presented any false charge against him—if it were shewn me that I had made any unjustifiable observation upon his conduct or character—promptly and publicly would I make him an apology. Not only should I do so now, when the act might be suspected to proceed from a view to deprecate punishment; but when that punishment shall have expired (if your lordships should think proper to inflict any) and that I should happen to survive it, I would not hesitate to make such an apology, if convinced, that I had been erroneous or unjust in any part of my publication: for I do not dislike any human being so much as to forget in that dislike the respect which I owe to truth and to my own character. I have not, however, the slightest apprehension that such a conviction, as should dictate such an apology, can be produced: for here are before me the horrid testimonies of his atrocity; here are the speaking proofs which sullied his administration in Ireland; here are the records, which, if read this day, would present such scenes of cruelty as have never been paralleled in the history of man, either in a state of barbarism or civilization.

The Court here interfered, and told the defendant that he was proceeding irregularly, and that he must be committed and brought up again for judgment, if he did not alter his conduct.

Mr. Finnerty. I do not mean to be irregular. As to the second consideration, for letting judgment go by default, I have explained the cause in my affidavit. After your lordships had declared the opinion there stated, I saw no utility in going before a jury. I could not expect that any statement of mine, coming from an interested party and unsupported by evidence, which you declared inadmissible, would have any weight with your lordships; and it would have been absurd, nay, presumptuous, in me to calculate that any effort of argument in my power, or in the power of any advocate to whom I might resort, could serve to dislodge from your lordships' mind an opinion so decidedly expressed, or could counteract the influence of that opinion upon the mind of any jury, when seconded by the argument and authority of your lordships. Under these circumstances I thought it a waste of time to lay my case before a jury; and more particularly, because I conceive that upon this subject of libel, *the will of the judge is the law of the land*. Here let me request that any observations I may think it expedient to make upon the law as it applies to my case, shall not be deemed disrespectful to this court. Your lordships administer the law as you found it. But according to that law, it appears to my mind, that a jury, having a publication laid before them, charged to be a libel, and being prohibited from receiving any evidence as to the truth of such

publication—as to the character of the subject, would, whether such publication referred to the vilest wretch in existence, or to the purest character in society, be liable to find a verdict of guilty, unless influenced by their own private knowledge. Yet this is the law of which Lord Castlereagh has availed himself for the vindication of his *character*! for the proof of his *innocence*! I have seen the treatise of a Sir Thomas Mallett, who was, I understand, a judge of this court, and who says, “libelling against a common strumpet is as great an offence as against an honest woman, and perhaps more dangerous to the breach of the peace; for as the woman said she should never grieve to be told of her red nose, if she had not one indeed.” This, however, is but another illustration of Lord Coke’s doctrine in his case *de libellis famosis*. Yet this is the law to which Lord Castlereagh resorts for the *vindication of character*. But this doctrine of Lord Coke’s is, in fact, a mere description of the star-chamber practice, which practice is equally opposite to reason, to justice, and to the true principles of the English constitution. Indeed, it seems to have been noted so particularly by that celebrated reporter, with a view to save his own character from infamy; for it extends its shield alike to the living and to the dead. But in vain. In spite of Lord Coke and all who think with him, history will do its duty. The unmanly reviler of Sir Walter Raleigh and Lord Essex, the base panegyrist of the star-chamber, is still universally reprobated, and that reprobation is very little affected by the conduct of that lawyer relative to the prerogative, which he himself contributed to rear to an overgrown height, and which he opposed only when it became oppressive to himself.

The pretence of my *accuser’s solicitude about character is really ludicrous*. The very mode, indeed, by which he has thought proper to prosecute me, serves at once to negative the idea of his solicitude for character, and to prove his prejudice against me. If he had applied for an information in this court he must have sworn that the facts charged against him in my publication were false, and if he had proceeded by action I should have been afforded the opportunity of proving that they are true. But no, he proceeds by indictment, which at once relieves him from the necessity of swearing that they are *false*, and precludes me from the opportunity of proving that they are *true*; and this he calls a *vindication of his character*! This he calls *fair dealing*! But, my lords, if the vindication of character—if genuine justice were his object, an action would have been his course of proceeding, because, as the enlightened editor of Blackstone’s Commentaries observes: “The chief excellence of the civil action for a libel consists in this, that it not only affords a reparation for the injury sustained, but is a full vindication of the innocence of the person traduced.” But the

motives of my prosecutor for declining to bring an action are obvious. They speak a volume to every intelligent mind. They show most clearly, that he sought only to gratify resentment; but did not think it prudent to hazard an investigation of character, and therefore chose to avail himself of the doctrine, that "the greater the truth the greater the libel."

Mr. Justice Le Blanc. You are travelling quite out of the road.

Mr. Finnerty. I am not deviating from the law, and surely it is competent to me, to speak to the motives for the course taken against me. Allow me to add, that as interruptions would embarrass the most experienced practitioner in this court, I request you to consider, that they must be peculiarly embarrassing to one, appearing in a new scene, and quite unaccustomed to this mode of public speaking.

Lord Ellenborough. Sir, unless you take the warning which has been given you, the court must let its justice overcome its compassion.

Mr. Finnerty. *Compassion*—I ask only for justice; Lord Castlereagh professes to bring this prosecution in order to vindicate his character, which he accuses me of having unjustly censured, and am I not then at liberty to speak to that character for the vindication of my own conduct.

Lord Ellenborough. No: the prosecution has been brought to satisfy the justice of the country by the prevention of libels.

Mr. Finnerty. Why, Castlereagh's complaint against me for injuring his character, forms the very *gist* of the indictment. But I will dismiss this topic with the observation, that I envy not Lord Castlereagh what he may gain in public estimation by the course he has taken against me. The result may possibly be the infliction of some punishment upon me, but I rather believe that *punishment will not induce one man in the British Empire to think better of him, and it may induce many to think worse.*

Whenever a man to whose name any publicity attaches, and against whom any prejudice is supposed to exist, is brought to trial in this court, it is usual with your lordships to exhort the jury, to discharge all such prejudices from their minds—to consider merely the case before them, and to judge of the party accused, from the circumstances of that case alone.—If it were my fate to appear before a jury, it might be necessary to use a similar exhortation: for my name has been for some time an object of peculiar obloquy—a butt at which any calumniator might shoot with impunity, nay, occasionally, with a prospect or even certainty of reward; and although, with regard to my own feelings, such shots "pass by me as the idle wind which I regard not," yet they may have affected the minds of others. Although I have never throughout my life, been guilty of at-

tempting, or even meditating any act of cruelty, deceit, or injustice—although I have never deliberately uttered a word, or written a line, contrary to my conception of its rectitude, and my belief of its truth—although I have never permitted self to influence my judgment or my conduct upon any question of general interest—although I have never heard of any act of oppression without feeling a desire to restrain the oppressor and to relieve the oppressed—although I have never ceased to forward by all the means in my power, the principles of freedom, justice, and humanity—which are the principles of the British constitution, administered in its purity—the principles of reform—the principles, by the support of which, the great Chatham acquired fame, and his son acquired power—the principles, by the support of which, the character of Sheridan has become more conspicuous, than by all his talents and his genius—the principles of Lords Moira and Erskine, and Mr. Whitbread, and some of the best men in England—the principles, by the support of which, the name of Fox has been engraven upon the heart of England, and Lord Holland has been able to succeed to his popularity—the principles, by the active, ardent, and invariable support of which, Sir Francis Burdett has been raised so high, as to force those even who dislike the principles, and perhaps the man, to recognise him as the confidential organ of public opinion—the principles, in fact, his generally conceived partiality to which, render the illustrious heir to the throne, a distinguished popular favourite, particularly in Ireland, where esteem and confidence attach to his name, where hope is still cherished in consequence of the prospect which his character holds forth, and I trust that hope and that confidence will be justified by the conduct of His Royal Highness through life *

* The attachment of the Prince of Wales to the Irish nation has long been felt and acknowledged. Indeed the connection which his Royal Highness has peculiarly cultivated, would naturally encourage the Irish to calculate upon his friendship. He with whom such men as Lords Moira and Hutchinson and Mr. Sheridan are friends and favourites, cannot be indifferent to the fate of Ireland. But the Irish have much stronger grounds to rely upon the interest His Royal Highness feels in their favour. For it is known that at the period when Ireland was a scene of desolation and blood—at the period of 1798, when even an expression of sympathy for the persecuted Irish was among the mislaid loyalists of London, deemed tantamount to an overt act of sedition, the Prince of Wales was uniform in the expression of his sympathy for that people, and of his indignation against those who had goaded them into desperation and rebellion. His Royal Highness having had opportunities of correct information, must have been aware that the Irish were not in rebellion against the throne or the constitution of England, but against a horrid system of cruelty and injustice which deprived them of the protection of the one and the enjoyment of the other. He must have recollected that while another part of the empire had twice within a century revolted against the throne and constitution of England, the Irish were tranquil and loyal. From these circumstances, and from the conduct of the Irish under all the pressure of persecution, the Prince must see that that people are as free from any predilection to disloyalty as they are incapable of any submission to tyranny. Without consulting the history of that nation for centuries, and each

These are my principles.—From the moment I became competent to form an opinion, these principles I have uniformly supported; under the pressure of difficulty and persecution I have supported them, without any prospect of profit or of power. It is well known, that what I receive of profit from the press, does not depend upon the nature of the political principles I embrace. No charge of "*base lucre*" can apply to me; a charge, by the way, rather singularly coming from a man, forsooth, who never opens his mouth without a fee; and here I beg leave to ask in passing, why the gentlemen connected with the press are not as well entitled to a fair remuneration for the exercise of their talents, as the gentlemen connected with the bar, or with any other of the liberal professions? The principles and conduct I have described being those which I have uniformly pursued from early life, surely my conduct throughout has furnished at least presumptive evidence, that I have thought myself right; yet I have been abused, foully abused. Every thing that the invention of malignity and political prejudice could suggest, has been sent forth to injure me, and there are too many apt to decide against a man merely because he is accused—*who have not the patience or the justice to inquire before they decide*. I am sorry that I should have occasion to say so much, even negatively, with regard to myself and my conduct; but the situation in which I am placed renders it necessary.

century furnishes similar instruction, His Royal Highness has seen enough in his own time to convince him that coercion is not the system applicable to the Irish character—that every Irishman called upon to suffer for his country, is evidently resolved that his conduct shall afford no example to encourage the calculation of any despot, or to excuse the timidity of any slave. Castlereagh might tell the Prince how the Irish suffer—that, in fact, every Irish martyr makes a thousand Irish heroes—that the Irish are not to be broken down. No, while Greece and Rome, those ancient boasts of liberty, and valour, and learning, have been trodden down by superstition and tyranny, Ireland, in spite of centuries of persecution, still preserves its energies unbroken. Never—never, in the history of the world, has any nation appeared so difficult to be subdued by force—so easy to be conciliated by kindness. All its history shews the former, and the latter is demonstrated by even recent experience. Lord Cornwallis acquired popularity in Ireland by abstaining from murder—by putting an end to torture; and it is notorious that that popularity contributed to forward the union. The Duke of Richmond also became popular, and his popularity might have continued if it were not blighted by the rashness and indiscretion of Wellesley Pole. But how did the Duke of Richmond become popular? Why, simply, by refusing at some public meetings to countenance certain toasts notoriously offensive to the people. Here are two conclusive instances as to the facility with which the Irish may be conciliated—one Viceroy becoming popular for declining to be cruel, and another for declining to be offensive: and if then such important results arise out of mere negative kindness, what must be expected from positive benefits? Would to God that the Prince of Wales may reflect upon these considerations, and hence learn how to govern Ireland—that for his own sake, for the sake of the empire and of Ireland, he may cultivate the favour of a people never found wanting in gratitude. That His Royal Highness is sincerely disposed to please and to serve that country is the firm persuasion of the writer of this note, who would not be the sycophant of any man, but who would refuse justice to no man.

There is, my lords, a prejudice apt to be excited against a man who ventures to expose or censure the conduct of men in high station like my prosecutor, of which I think it proper to take some notice: I can hardly conceive upon what ground the prejudice can rest, if persons in high station deserve censure, unless it be upon the doctrine of Lord Coke, who although a very able lawyer, was in my opinion a very bad legislator; although an able reporter of what was, (and even his accuracy in this respect has been questioned,) was a very bad judge of what ought to be—of what may be called the reason of things. In proof of the deficiency of his judgment in this respect, I have heard an anecdote, that Lord Coke being asked the reason why a father did not of right succeed to the estate of his child, answered—“because the earth was heavy and could not ascend.” This then was the man who argued, that because it would be a scandal to the state to have corrupt or wicked men in authority, any one who exposed or censured such men, ought to be punished; *instead of arguing in the plain, honest, and rational way*, that any one who exposed the corruption and wickedness of such men in authority, and so afforded the state an opportunity of rescuing itself from the scandal of employing them, ought to be rewarded. Unless, I repeat, upon the perverted reasoning of Lord Coke, I cannot conceive why prejudice should prevail in the case here referred to. Certainly there is nothing in the precepts of justice or the experience of history to warrant such a prejudice. As to justice, she would naturally say with common sense, that any man who deserves censure, ought to receive it, and particularly where such censure has any tendency to check vice, and to prevent the abuse of power;* and as to history, without *alluding to any living instances, for I do not wish to make invidious allusions*, how many cases does history furnish, to shew that the censure of men in high station, may be a laudable act—where that principle which prompts an honest man to wage eternal war against vice, should impel him to reprobate the conduct of some men in high station—where such reprobation is not only undeserving of prejudice, but entitled to praise. There are no higher stations in this country than those of the King, the Chief Justice of this court, and the Attorney General; yet your lordships must be aware of the case of Peachum, against whose life these three great officers conspired,

* A very wise man has observed, that “true satire may be called the rage of probity and even of good nature. It is the indignation of virtue and wit against vice and ill nature.”—But what is to be done with those whose faults and vices are amenable to satire alone:—of those the poet says—

“Some hornet-like the cobweb laws can rend,
And some elude them subtle as a fiend;
Say, what can these but satire’s lash restrain,
At these then satire virtue’s cause maintain.”

by making a manuscript sermon found in his possession, which sermon was never preached or published, an overt act of high treason. Such was the conspiracy of James the I. of the great Lord Coke, as the lawyers call him, and of that greatest and meanest of mankind, Sir Francis Bacon. There, then, is one instance of turpitude which is recorded upon indisputable authority, that should forbid the presumption that great men are not apt to deserve censure, and that should forbid a prejudice without examination against those who become their censors. But there is, further, the instance of Archbishop Laud, and also that of Jefferies. So here are instances from the church, the law, and the throne; from the greatest offices in the country to justify the censure of men in high station. But with respect to Jefferies, the petulant, irritable, imperious Jefferies, as his biographer describes him; thank God, the record of that monster's guilt is accompanied by the record of his punishment, and teaches a wholesome lesson as to the consequence of sacrificing justice to passion, of preferring the transient favour of the court, to the permanent good opinion of the country—I perceive that your lordships approve of my reprobation of this judge; yet what was Jefferies to——. The doctrines of Lord Coke, upon which my prosecutor has proceeded, applies alike to the living and the dead, the good and the bad; but would your lordships attend to a complaint against me for libelling Jefferies, who may have some relations or friends in England, willing to knock a man down for abusing him? I assume not: then, how can you consistently punish me for abusing Lord Castlereagh? Will you even entertain any prejudice against me for reprobating such a man; or will you not, my lords, discard any prejudices which the disposition to censure such a man may have excited elsewhere? *There may be persons in this country*, and of high rank and power too, who entertain prejudices against me: but it is a satisfaction to me to know, that *the judges of England have no occasion to court the favour, or to dread the resentment of any power in England.*

According, I understand, to a doctrine of Lord Kenyon, laid down in William's case, it was held, that a man who is himself a libeller, is not entitled to complain of another who libels him. The principle upon which this doctrine rests is obvious, and I think indisputable, *although the application of that principle* in the case alluded to, *may be very questionable*; for the principle appears to be simply this, that a man who is really infamous, shall not be entitled to complain of another who says he is so infamous; or in the old language of the law, that a man should come into court with clean hands. Now I presume there are men of such a description as you would not attend to, if they applied to your lordships for the punishment of a libel upon their character, notwithstanding the latitude of Lord Coke's old doctrine. I

presume that if a man of notorious turpitude of conduct were to appear in this court as the prosecutor, the punishment of his censor would not be severe. If, for instance, a man guilty of deceit, of bribery, of injustice, of cruelty—if a man, whose character was formed upon the precepts recommended by *Erasmus to Ammonius*, which precepts were, as well as I can recollect, nearly as follows: “In the first place,” says Erasmus, “throw off all sense of shame—thrust yourself into every one’s business, and elbow out whomsoever you can; love no one, but profess love to any one who is likely to believe you, and to return proofs for professions; court the great by flattering their vices, and describing the poor alone as profligate; plead for the principles of justice and humanity when they make in your favour; but when they make against you, deprecate them as effeminate weaknesses or impracticable theories; put on a look of sympathy, that people may give you credit for feeling, but do not allow feeling to interfere with your personal views; measure every thing by your own advantage; let this be the scope and drift of all your actions—give nothing but what is returned with usury, and be complaisant to every body—*have always two strings to your bow*”—what attention would your lordships pay to the complaint of libel by such a man. If a man, convicted upon his own confession, of such an act as one of the highest authorities in England had said was *such as our ancestors would have startled at the mere mention of*; if a man whom all parties in politics agreed in reprobating—if a man who had squandered the blood of his countrymen either in the cruelty of domestic oppression or the folly of foreign expedition—if a man, who by his ignorance and insensibility, had projected a plan, which led to the waste of millions of money, and the loss of thousands of lives, were to apply to your lordships for the punishment of his censor, *could your lordships preserve your gravity upon the application*. But to return to the doctrine of Lord Kenyon—*If A libelled any letter in the alphabet, A would not be entitled to complain if B libelled him, then, A FORTIORI, A would not be entitled to complain of B if he had libelled B himself*. How then stands the case between Lord Castlereagh and me. Look at the order, which he confesses at least that he was a party in issuing. On the first view of this order one would be disposed to laugh at the folly it betrays, if the disposition to laughter were not checked by the malignity it demonstrates. What must all intelligent men of England and of the Continent think of a minister, who, when sending out the largest expedition that ever sailed from our shores, busied his mind in watching the movements of the humble individual who stands before you. Why, in a fourth of the time he had been so busied, he might have provided bark for the troops, from want of which I afterwards saw them perish; he might have

inquired of some medical men about the nature of the climate of Walcheren, of which I believe in my soul that both himself and his colleagues were totally ignorant. I think this order originated wholly with Castlereagh, and can *a fouler libel be imagined than that order presents*. Does it not teem with calumny? A libel is stated to be a misdemeanour, because it has a tendency to provoke a breach of the peace. *But what should your lordships think of a libel that had a tendency to provoke assassination*; and has not this order that tendency, which holds me forth to the army and navy as a spy and a traitor; which placed me in the perilous situation that is described in the affidavit of Mr. Power, who combined the opportunity of extensive intercourse with the capacity of accurate observation. How few were the readers of my alledged libel, and how powerless to do any injury to Lord Castlereagh, compared to the number to whom the order I complain of was known, every one of whom had the power, and I contend that this order furnished the provocation and pretext to put an end to my life.

Blackstone states, that upon a prosecution by indictment for assault, if the defendant can prove that the prosecutor was the first assailant, he is entitled to an acquittal. Now, if such a principle of justification be admissible upon an actual breach of the peace, or even upon a charge of murder, it will not, I should think, be refused upon a libel, which is alledged to have only a *tendency* to a breach of the peace. *Then, my lords, who is the aggressor in this case*—who has given the greater offence—who has inflicted the greater injury? Should I not rather be the accuser than the accused on this occasion. If A actually assaulted B, and that B in consequence called A a scoundrel, a knave, or applied to him any other opprobrious epithet, and A should indict B as a libeller for the application of such an epithet, would your lordships inflict any punishment upon B? If not, then what pretence can my prosecutor have to require the infliction of any punishment upon me. Nay, if I had indicted Lord Castlereagh for a libel in having issued this order, in having published this foul libel, would not your lordships think him highly deserving of punishment. *All men are equal in the eye of the law*; but independently of that maxim, I know not what among the generally received criteria of distinctions in civilized society that should entitle Lord Castlereagh to any consideration to which I do not feel an equal claim.

Again let me request your lordships to consider the situation in which I was placed by this order, with regard to which you have seen from my affidavit that I made no exaggerated inference. Of this you will be more satisfied from the following article, which is the publication I referred to in my affidavit. The editor of this publication, who generally reviews my conduct and

character rather in the spirit of an executioner than in the temper of a judge, thought proper to observe with regard to the motion for issuing this extraordinary order, that—

The Court. Why we cannot allow this publication to be read.

Mr. Finnerty, I offer it in order to shew the inferences injurious to my character to which this order gave rise, and with the same view I wish to read an article from the *Morning Post*, which I have reason to believe is the production of Mr. Edward Cooke, the friend of Lord Castlereagh.

Court. We will hear neither.

Mr. Finnerty. Well, be it so. The attorney-general said on Mr. Jones's trial, that this order was issued because I was "*an unfit man*" to be allowed to go on the expedition: which description is liable to all the objections Sterne expressed against an innendo, for each reader may suppose me unfit, for just such reasons as his peculiar whim or prejudice may suggest. It would have been more candid in the attorney-general to have stated his reasons for deeming me unfit, and then I should have had an opportunity of answering them. By this order, in fact, I was *treated as an outlaw in Walcheren, and considered as a traitor in England*, although the unimpeachable loyalty, the high character of the gallant officer by whom I was invited to accompany the expedition, ought to have saved me from such treatment. But were I silently to submit to such treatment? would not my silence imply a consciousness of guilt—a fear of challenging inquiry? was I by silence to plead guilty to such serious imputations, rather than risk any pain to the feelings of Lord Castlereagh by complaining?

Now having done with that averment in the indictment which relates to the charge of personal ill-will against me on the part of Lord Castlereagh, and in the name of common sense, by what other motive under Heaven could such an order have been suggested, I proceed to that averment relative to tyranny, cruelty, and oppression, upon which I observed the attorney-general, in Jones's case, but slightly touched. He could not but recollect the indignant repulse of an attempt in this court to justify torture in Picton's case. Therefore the learned gentleman felt it matter of policy to overlook that part. Look to even so much as you have heard of the affidavits to judge of this averment.

But before I enter into the consideration of these affidavits, allow me to observe respecting the case of Orr, what a contrast this extraordinary case presents with regard to me. In Ireland I was prosecuted and punished as a libeller upon the Irish government (of which Lord Castlereagh was a principal advocate) for condemning that act, for pronouncing it culpable; and yet here in England, I am prosecuted by the said Lord Castlereagh, for pronouncing him in any degree responsible for it. Now, either he condemns or approves that act—if the former, I

could prove that he libels his own former language and conduct, and if the latter, how can he deem me a libeller for pronouncing him responsible for that act. But again I refer you to the affidavits, which disclose acts in comparison with which Orr's execution was a mere *peccadillo*. From these affidavits you will see that my difference with Lord Castlereagh was *not the effect of principles or theories of government*, as is generally insinuated, but of a practice which all political principles and theories equally disclaim—a practice which all systems, whether monarchical, aristocratical, or democratical, equally disclaim—which the British Constitution specifically condemns—which the philosophical commentator upon what the law of all nations ought to be, and the legal commentator upon what the law of England is—which Beccaria and Blackstone concur in deprecating—a practice which has been for ages exploded by the code of all civilized nations—a practice which all great and good men reprobate—it was for the practice of torture, notoriously sanctioned by my prosecutor.

Mr. Justice Bailey. That is not evidence.

Mr. Finnerty. What, would you place me in a complete circle. When I make a statement, you tell me it is not in evidence; and when I tender you the evidence, you tell me it is not admissible. Shall I be allowed to proceed.

[*Lord Ellenborough*, who had withdrawn for a short time, returned, when the defendant was thus appealing to the court.]

Court. Not in this way. You are hardly uttering a word that is not libellous: and when you begin a sentence, no one knows how it may end

Mr. Finnerty. Thus interrupted, teased, and threatened, it is hardly possible for any man to hold his mind so collected as to deliver a coherent address. I was in this court when Gilbert Wakefield was heard without interruption for three hours; but if you do not choose to hear me, of course I must desist. Do you refuse to hear me.

Court. No, if you are not indecorous.

Mr. Finnerty. I wish to be decorous in the mode of justifying my conduct. Every thing I have stated is true. I had no other way of proceeding to avert the consequence of Castlereagh's attack, than that to which I resorted. An action against Castlereagh, I was told, could not succeed; and so, in order to shield myself against his cool and cautious calumny, I could only have recourse to the press. I beg to revert to the case of Orr. The attorney-general said that Lord Yelverton refused to recommend Mr. Orr to mercy——

The Court. You cannot proceed on that topic.

Mr. Finnerty. Why it is stated in the original libel. I suppose I shall have the same indulgence which was given to Mr. Wakefield?

Lord Ellenborough did not know what *Mr. Gilbert Wakefield* might have offered during those three hours, but if it were as irrelevant as what the defendant was now uttering, he hoped the court interfered to suppress it.

Mr. Finnerty. When your lordship was absent from the court, I heard doubts expressed as to the practice of torture which I have affirmed in the original libel. It was told me that that practice was not in evidence. Why if it be pretended that *Castlereagh* did not order torture, I am sure that pretence will not avail, when you recollect the affidavits I have read; when you see that such cruelty was committed in the Royal Exchange, which immediately adjoins the castle, and from which the cries of the sufferers might have been heard in *Castlereagh's* office; where his *personal interposition*; where the mere expression of his will might have prevented the continuance of the torture. The advocates of *Castlereagh* appear to forget the maxim of a great authority, "*qui non prohibet, cum potest, jubet*; if a person does not prevent a criminal act when in a situation safely to do so, he should be held responsible for that act." Obviously he ought to be held as a *particeps criminis* in disposition. Doubts have been sometimes expressed here as to the actual infliction of torture in Ireland. Indeed I understand that many persons of high rank in this country have been persuaded to doubt upon the subject: and I am not surprised at it, for I have myself heard *Lord Castlereagh* in this country publicly declare, (although in the very middle of the scene of infliction) "that it was not practised with the knowledge, authority, or approbation of government." What, government not know of it?—That government which had such a system of *espionage* established in the country, as threw *Fouche's* quite into the shade—such a system indeed as enabled them to ascertain what was passing in every town, in every village, in every hamlet in the country—could be ignorant of what was passing, notoriously passing in the most public parts of Dublin, under the direction of the immediate agents and confidential friends of the government; in the immediate vicinity of the castle; in such a situation that the screams of the sufferers might have been audible in the very offices where the ministers of government met to perform their functions. The pretence of ignorance, therefore, on the part of government of such notorious transactions, is quite preposterous. It cannot impose upon even the proverbial credulity of the vulgar, much less upon the intelligent, upon any one capable of examining probabilities. That eminent advocate, *Mr.*

* It was the duty of *Castlereagh*, as the minister of the government, to know of, and to prevent torture—to protect the people against such horrid violation of law and humanity—and, according to the *dictum* of *Lord Holt*, "a man's omission of his duty should be taken as a presumption of his guilt."

King or Queen, the punishment should not exceed one year's imprisonment and 100*l.* fine; and another in the reign of Elizabeth, extending the punishment to two months' imprisonment, and 200*l.* fine—a contrast, by the bye, rather favourable to the popery queen. These statutes, I am aware, have expired, but they serve to shew the disposition of the legislature with respect to libels at that period. Another statute of modern date I will not allude to. I do not think it necessary, because it is evidently felt to be so little consonant to the meridian of England, that it has never been attempted to call it into action. So much as to principle; now as to precedents: I am aware that there are precedents to authorize any description of punishment for libel, such as slitting of noses, cutting off of ears, and even death itself; such, indeed, that the nature of the offence was altogether lost in the turpitude of the punishment; but these precedents occurred at times when, as Lord Clarendon observes, "Men began no more to consider the former manners of the offenders, but the men." From such precedents I am sure your lordships would shrink with horror; I will therefore pass them by and come to a precedent established by your lordships, to which I beg your attention. Mr. Herriot, proprietor of the *Sun* newspaper, was convicted of a libel upon Lord St. Vincent—of having charged the noble lord with a most culpable dereliction of duty, namely, of having exposed our commerce to considerable depredation, by omitting to send out

oognizance to keep the peace. It might go further: the sufferings of a prisoner are unknown to the public; or, if known, are soon forgotten; and inevitable ruin crushes not only himself, but his family. Imprisonment is, in fact, considered one of the highest executions of the law; and at common law, none could be imprisoned but for an offence attended with force and violence." 3 *Coke's Rep.* 11.—Now libelling is not attended with force or violence; it is not a breach of the peace; and upon what principle then of justice, of law, of humanity, of common sense, can the too frequently severe punishment of libelling be defended? It is an universal and indisputable maxim, that punishment should be proportioned to crimes."

I recommend the reading of an able tract upon this subject from the pen of Mr. Macnally, a distinguished advocate at the Irish bar. It is entitled, "An Argument on the law respecting arrests by the fiat of Judges in the case of John Magee, proprietor of the *Dublin Evening Post*." Dublin edition, 1791.—The whole of the tract is well worth reading. A fiat issued by Lord Clonmel, the Chief Justice of the King's Bench in Ireland, to hold the proprietor of the *Dublin Evening Post*, to excessive bail, in consequence of the free comments of his paper, gave rise to the publication of this tract. I remember that the conduct of this judge was such in this and in other cases, that Mr. George Ponsonby submitted a motion to the House of Commons for referring the consideration of such conduct to the Committee of Courts of Justice. This motion was of course rejected by a ministerial majority; but the debate upon it had the effect of restraining and regulating the conduct of this chief justice for the remainder of his life—it taught him a wholesome lesson. See the character of this chief justice, in the second part of the *History of the Union*, by Sir Jonah Barrington.

timely notice to our colonial possessions of the commencement of the present war. For this libel Herriot was sentenced to six months' imprisonment in the King's Bench prison, without either fine or bail. Mr. Herriot's was a libel totally and radically false, as Lord St. Vincent solemnly swore.—Mine is a libel totally and radically true: Mr. Herriot's was a libel published without any provocation, personal injury, or offence. The provocation, injury, and offence, which I have received, have been fully detailed, and are incontrovertibly proved in the affidavits before your lordships.—Mr. Herriot's was a seditious libel, applying to a member of the government—to the first lord of the admiralty:—mine is not of that description. Mr. Herriot's was a libel upon one of the most gallant officers our navy can boast; upon a man who, however he may have acted towards some individuals, is confessedly one of the most meritorious public men in this country: mine is a libel upon Lord Castlereagh. This, combined with an assurance that my means are not adequate to the payment of fines, I leave to the consideration of your lordships. I beg your lordships also to remember the case of Blagdon, who was confined but for six months also for a libel upon Lord St. Vincent; and that of Draper, who was confined for only six weeks in the King's Bench prison for a libel upon Mr. Sullivan, who is a member of the Privy Council.

Here I must take leave to submit an observation, which I think due, in justice to myself; and which I offer without any disposition to reflect upon the character of any set of men. In consequence of my conduct in opposition to their favourite candidate at the Middlesex Election of 1802 and 1804, I understand that the magistrates of that county are collectively and individually, if I am rightly informed, some of them even avowedly, my enemies. Now as Cold Bath Fields' prison is notoriously under their controul, I submit to your lordships the impropriety of committing me to their custody. In fact, from what I learn of that prison, and from the state of my health, to send me there would be to consign me to actual death under the sentence of a nominal imprisonment. It would be more humane, my lords, at once to dispose of me as Bonaparte is said to have disposed of Palm, the bookseller: for rather should I meet death at once than be compelled to endure the tedious agonies of that dissolution, which must be the consequence of a close imprisonment. This statement I submit to your lordships, assured that you will give it a due consideration, bearing in recollection that wise maxim of Blackstone, which all wise judges should have present to their minds, namely, "that second to the duty of administering public justice, it is the duty of a judge to give public satisfaction."

It may be said—it has indeed been intimated to me that the

course I have taken may serve as an aggravation. But in the sense in which that intimation appears, I conceive it impossible, as I before observed, to justify a libel at all:—for how can a libel be justified but by proving its truth, and how can its truth be proved without an aggravation of the pain originally given to the feelings of him who is the subject of it. But why should I be tenacious as to the feelings of Lord Castlereagh, who has endeavoured to deprive me of character, and now seeks to deprive me of liberty; who has prosecuted me under circumstances different from any case I have ever heard or read of, excepting the *celebrated case of the abbot of St. Albans*, who sought to punish a man for a libel, because that man ventured to complain of the abbot, who endeavoured to make him a cuckold. So Lord Castlereagh seeks to punish me as a libeller because I have ventured to complain of his endeavours to proclaim me a traitor. But the abbot of St. Albans failed, and so, I trust, will Lord Castlereagh. This noble lord, and I am informed upon such authority that I cannot doubt its truth, has ascribed to me an offence which the laws pronounce deserving death, and yet he calls upon your lordships to punish me for attributing to him an act for which he has merely incurred censure. I do not then mean to make any concession to the feelings of such a man. I am sure your lordships would not require such concession from me. I am come to make atonement, not to Lord Castlereagh, but to the laws, if I have violated them; and upon this point—upon the justification of my conduct, in consequence of my intention, as I have stated in my affidavit, I beg to read the words of a few authorities to your lordships, and particularly the words of that able and honest man, Lord Erskine, in his speech on the Dean of St. Asaph's case.

Lord Ellenborough. That is no authority, what the opinion which a barrister takes up *for convenience*.*

Mr. Finnerty. What, do barristers take up opinions merely for convenience? This observation from the bench may be applicable, but not, I think, to Lord Erskine. But I see that I must decline the quotation to which I proposed to refer.

If notwithstanding the proofs of my intention and the truth of my publication, punishment should still be awarded me, and that the record of that punishment should go down to posterity accompanied by any fair biographical sketch of Lord Castlereagh, including particularly his conduct in Ireland, what, let me ask, *will the generous reader think of such a transaction?* Will he not exclaim—What was the state of England—under what system was it governed in those days, when it was not enough that an English subject should have cause for complaint, but that he should

* What a compliment to the general principles of the law.

be punished for complaining; when it was not enough that he should have been persecuted, but that his persecution should be aggravated for daring to tell his tale of woe?

My lords, the eye of England is upon you, being naturally interested in every proceeding of this court, and particularly so on every occasion concerning the *liberty of the press, which ought never to be punished but for a violation of truth, and the liberty of the subject, which ought never to be infringed but for a violation of the laws*. But however the eye of England may be directed, I know, and am proud and happy to know, that the eye and the heart of my native land is fixed upon you, anxious to ascertain the result of a controversy between ONE who suffered for the liberties of his country, and another who tortured his countrymen into rebellion: desirous to know how this, an English court of justice, will decide between one Irishman who has the good fortune to be esteemed by his countrymen, and another who is the object of their universal de—— But here I check myself. If it be said that punishment is not inflicted to satisfy Castlereagh, but to satisfy the law: I answer that my conduct had no tendency to provoke a violation of the law. For even upon Lord Coke's doctrine, where are the men to be found to violate the peace in order to revenge a libel upon Lord Castlereagh. Is it in Ireland, whose population he persecuted, whose parliament he succeeded in destroying; is it in England, whose parliament he confessedly endeavoured to corrupt; is it in any part of that empire whose blood and treasure he squandered at Walcheren. It might, in fact, be as well pretended upon Lord Coke's fiction, that the abuse or exposure of any of the vices had a tendency to provoke a breach of the peace, as the abuse or exposure of the misconduct of Lord Castlereagh.

Let me hope, my lords, that throughout this address, in which I fear I have trespassed upon your attention, I have in no instance deviated from my promise and purpose, to utter nothing in the slightest degree disrespectful to your lordships. Certainly I had no such intention. But having been all my life in the habit of speaking the language and maintaining the character of a free man, it would ill become me to abandon that language and character before this high tribunal. If, indeed, I were guilty of such an abandonment, sure I am that it would have no other effect upon your lordships' mind than to provoke your contempt. No, rather should I meet the utmost punishment in your lordships' power to inflict, than deserve contempt—than incur infamy by acting the part of an hypocrite, particularly in a court of justice. I am, however, fully satisfied that no error in judgment, or lapse of expression into which I may have been betrayed, can withdraw your lordships from the decision which justice would dictate upon a

Curran, whose transcendent talents decide the long pending dispute between ancient and modern history upon the subject of eloquence, combining as he does the richest modern improvements, with the energy of Demosthenes, and the brilliancy of Cicero, heightened by a degree of consistent patriotism and genuine courage, which raises him infinitely above both, adverted to those base attempts at imposture in his celebrated speech on the trial of Hevy's action against Sirr. These are his words: "For England (said he) I cannot too often inculcate upon you that the people know nothing of our situation. *When torture was the daily and ordinary system of the executive government*, it was denied in London with a profligacy of effrontery equal to the barbarity with which it was exhibited in Dublin; and if the facts that shall appear to day should be stated at the other side of the water, I make no doubt that very near *one hundred worthy persons* would be ready to deny their existence upon their honour, or if necessary, upon their oaths." Here, then, I have the unqualified testimony of this most distinguished man in support of the charge contained in the libel, and is it within the scope of probability that such a man, standing in a public court in Dublin, surrounded by the friends of the government, and in the presence of a judge, (the late Lord Kilwarden) whom Mr. Curran is known to have most esteemed and respected, whose good opinion he most valued—is it to be supposed that in such presence, before such an audience, Mr. Curran would have committed his high character by asserting the fact of torture, and so directly charging the government of my prosecutor with a knowledge and toleration of that torture, if that charge were unfounded? No, my lords, neither the assertion nor the charge require any evidence to sustain them in Dublin, although one hears them so often denied in this country—although one is condemned to witness that consummation of knavery which consists in aggravating guilt, by the solemn profession of innocence. Such denials and professions, however, cannot avail if a proper inquiry be instituted, as I hope there will; and what a singular exhibition it must be, if at the moment I may be in a gaol for libelling my prosecutor, the Commons of England shall have ordered his impeachment. But will you, my lords, as the ministers and advocates of English law, punish the man whose only guilt is the reprobation of him by whom such tortures were permitted, were patronized. What will Europe? what will America? what will the whole civilized world say? particularly in comparing your conduct with that of France; if England, panegyrized by Voltaire, as the first nation in Europe that abolished torture, shall appear to be the last to tolerate its infliction, by punishing a man for reprobating its patron.

Lord Ellenborough. You assume it, sir.

Mr. Finnerty. I am ready to prove it—and will you then punish me for abusing him; will you send me to a gaol for reproaching him, by whom more has been done, infinitely more, to alienate Ireland from the English government, and English connexion, than by a Chichester, a Faulkland, a Stafford, or a Borlace, or any of those tyrants, who have at different times abused the power of England to persecute the population of my unfortunate country. That Ireland has been so persecuted, and unjustly persecuted, I could quote you the authority of an amiable prelate, whose name would, I should think, be heard with respect by this court. Yet that prelate, for delivering the sentiment I allude to; for deploring, as Mr. Pitt once did, that Ireland was always treated with illiberality and injustice; for recommending towards the Irish a measure of conciliation, was in my hearing most grossly abused by a colleague of Lord Castlereagh's in the Irish government; he was in fact charged with "a total and radical ignorance of the history of the country from whence he came, and also of the country in which he lived." Such were the gentlemanlike, such the manly terms, which Lord Clare applied to the Bishop of Killala, in the Irish House of Lords, and such the treatment which Lord Clare and his colleagues would offer to any man, who felt and acted like that humane prelate; such or similar is the treatment which my prosecutor now seeks to inflict upon me, through your lordships. But no means can, I hope, ever succeed in making a British court of justice the instrument of oppression.

I have declared that I did not intend to write a libel, and to that declaration I think it will not be difficult to obtain credence,—that I did not know that I was violating the law. If it be told me that I ought to have taken care, that I was bound to know, I would ask your lordships, I would ask all the lawyers in the kingdom, *where the knowledge that could guide me is to be found—what is the law of libel?* Might not one, in this case very fairly press the application of the maxim, that "where there is no law there is no transgression." But at all events I apprehend, my lords, that it is some excuse for the violation of a law, that it is difficult to understand it; that the excuse amounts to a justification, when it is impossible to ascertain it; and is it too much to say that it is difficult to understand, that it is impossible to ascertain, that with regard to which the first judges this country has ever produced, have been in their opinions inconsistent with each other; with regard to which, indeed, scarcely any judge is to be found strictly consistent with himself? Is it necessary to cite instances of such inconsistency? is it necessary to shew Coke, Scroggs, Jeffries, Wright, Raymond, and Alli-

bone versus Powell, Holt, Lee, Lord Camden, Lord Ashburton, and Lord Ellenborough, in Mr. Perry's case; nay, the difference between your lordship and the attorney-general in that particular case—and further, the known difference between your lordship and Lord Erskine, as to a very important point? When such differences are found among such persons, as to the meaning of the law, let me hope that it will not be deemed a serious offence upon the part of a plain man like me, if I have misunderstood that law, and have acted upon that misunderstanding—if I have thought that the reprobation of cruelty and injustice, that the complaint of personal injury was no crime, and if I have offended through ignorance. For surely upon *this* subject the maxim of *ignorantia legis non excusat*,* is utterly inapplicable.

Now, my lords, with regard to punishment, the first question which occurs to my mind in considering the subject, is this, which I submit with all possible deference:—A libel is deemed an offence, because it is alledged to have a tendency to a breach of the peace. If, then, it has only a tendency to a breach of the peace, I would ask, with great deference, upon what ground is it punished with more severity than any actual breach of the peace ever has been either in this or in any civilized nation? Nay, upon what ground is it punished with more severity than even a challenge to fight a duel, which is a direct provocation, not to an ordinary breach of the peace, but to murder? Nay, further, upon what ground is it punished with more severity than felony, than manslaughter, the punishment of which is limited by statute? But no limitation is prescribed to the punishment of libel. Indeed the legislature have meddled very little with the subject—it is left entirely to your lordships' discretion,† which is subject to no other controul than that of the law of opinion, and to that discretion

* "Ignorance of the law is no excuse for it."

† Before the Revolution, while the Judges held their place *durante bene placito*, they considered that where the conviction was on a charge of *misdeemeanour*, as in cases of libel particularly, and the punishment was in the discretion of the court, that discretion extended to any punishment short of life or limb. They pronounced sentence of mutilation, branding with hot irons, slitting the nose, and imprisonment and heavy fines. But at the Revolution, merciless discretion is reprobated and restricted by the voice of the legislature. The declaration of rights and liberties against the conduct of James the second, sets forth, that he, by the assistance of divers evil counsellors, did endeavour to subvert the laws and liberties of this kingdom; and in the recapitulation of those grievances states, as one instance of subverting the laws, "violent prosecutions in the Court of King's Bench, and causing partial and corrupt jurors to be returned on trials, excessive bail to be taken, and excessive fines to be imposed, also cruel punishments to be inflicted, all which were declared to be illegal, and infringing upon the ancient rights and liberties of the subject, by statute 1, Will. and Mary, stat. 2. ca. 2." The evils complained of and abolished by the above statute, appear to have sprung out of an assumed right of

I submit the questions I have stated. I have seen some statutes relative to the punishment of libels; one so far back as the reign of Philip and Mary, which prescribed that even for a libel upon the

discretion to pronounce what sentence the judges pleased in cases of misdemeanor; that is, they substituted *arbitrary will* for *sound discretion*. For the matter complained of in respect to the conduct of the judges of the Court of King's Bench militated not only against wisdom and humanity, but against the *express common law of the land*. Now, what is *discretion*? It is a judicial quality vested in the judge by virtue of his office. Lord Coke, who like most lawyers was occasionally right and wrong as it suited his views, says in his 2 *Institutes*, p. 16, "It is to discern between right and wrong—shadows and substance—equity and colourable glosses"—and, "it is not to do according to our *will* and *private affections*: and such discretion is to be *limited* and *bounded*." "Therefore," says the same authority, "whoever hath power to act at discretion, is bound by the rule of *reason* and *law*." "For justices," continues Coke, "must remember that it is a *legal discretion* in which, in *favour of liberty*, great tenderness is to be used: and though there be a latitude of *discretion* given to one, yet he is *circumscribed*, that what he does be *necessary* and *convenient*; without which no liberty, no jurisdiction can defend it." 2 *Institutes*, 298. *Hobart*, 158. "For these reasons, when the law leaves any thing to any person to be done according to his *discretion*, the law intends it must be done with *sound discretion*, according to law and the bill of rights. What is sound and legal discretion? This court has a power to redress things that are otherwise done; notwithstanding they are left to the discretion of those who do them; for their discretion is not properly discretion, but folly or madness, who do things contrary to reason and against law." 1 *Lilly's Abr.* 477.—The superintending power which the constitution thus wisely confides to the Court of King's Bench does not, however, authorize judges of that court to exercise an uncontrolled discretion. The statute cited shews, that the restrictive rules of legal discretion over *personal liberty* are as binding on the chief justice and his brethren, whether acting collectively, or individually, as on any subordinate magistrate; they are as strictly binding on courts of law, as principles and precedents are coercive on the Chancellor or the Barons of the Exchequer in the courts of equity. "If judicial discretion were not thus circumscribed, the subject (says Lord Coke) would feel it a crooked line, ruinous to the personal liberties of the people," "whose liberties or rights (adds Blackstone) have never been abridged by the laws of England without sufficient cause," "and cannot," concludes an illustrious foreigner (Montesquieu) ever be abridged at the discretion of the magistrate without explicit permission from the laws."—1 *Institutes*. 13. 1 *Blacks. Comm.* 134. *Montesq. S. L.* 611.

"The reason of this doctrine is obvious, "for (says Sir William Blackstone) *civil liberty*, which is the very end and scope of the English constitution, rightly understood, consists in the power (of the subject) of doing whatever the law permits; which is only to be effected by a general conformity of all orders and decrees to those equitable rules of action, by which the meanest individual is protected from the insults and oppressions of the greatest:—"For (says Smith, in his Commonwealth of England, speaking of courts of equity) there is as much difference between the conscience of men, or their *discretion*, as between the measures of their feet; and as one man may have a larger foot or shorter foot than another man, so may his conscience or discretion be more contracted or extended." 1 *Blacks. Comm.* 6.—"If the personal liberty of the subject was not thus protected by the law; if the highest magistrate, weak, partial, obstinate, or corrupt; judges, influenced by caprice, by resentment, by party prejudice, by personal obligation, by favour, by affinity, or by persevering ignorance, might, under pretence of *legal authority*, exercise an arbitrary power: the sentence might run to perpetual imprisonment, by inflicting a fine beyond the defendant's power to pay; it might inflict death by the duration of imprisonment; it might create both these evils, by demanding enormous bail in a re-

fair consideration of the case. Indeed, to allow any erroneous conduct of mine, in my defence, to operate against me in your lordships' judgment, would be entirely inconsistent with the acknowledged principle of law which declares that no man shall suffer punishment for what he may do in a court of justice in order to procure right for himself, or to prevent wrong from being done to him by others.

I have laid before your lordships every thought that has occurred to me upon this subject, as plainly and undisguisedly as they presented themselves to my own mind. I have endeavoured to give you an adequate description of the treatment I have experienced from my prosecutor, but the consequence of that treatment to me has been such, my lords, as I cannot persuade myself to describe. Ask, then, your own minds, whether I could have acted otherwise? whether I could have silently overlooked such a public attack upon my character as the order alluded to? whether I ought to be condemned for complaining of such an order as put my life and liberty in peril; as deprived me of the opportunity of deriving profit from the honest exertion of my talents? whether I ought to be condemned for endeavouring to vindicate my character; for stating nothing but the truth—for censuring the man who oppressed me in Ireland when a mere boy; and who has ever since continued to slander my name?

The whole of my case is now before your lordships, and I leave it for your consideration, with that hope as to the result, which the reputation of British justice would encourage me to entertain. But, again, I would request your lordships to recollect the nature of the provocation I have received; to consider whether, after such provocation I deserve punishment. I will say no more about my sufferings, on account of the present prosecution—about my expenses, about my loss of time, and my subsistence depending as it does, upon the exertion of my talents. I hope I shall be able to support my punishment with firmness; but although I were to be confined in the dungeons of Dionysius, I would not exchange character with my prosecutor. I must conclude, with expressing a conviction that every part of the alleged libel being true, as I am ready to prove, it is perfectly justifiable.

The Attorney-General then rose on the part of the prosecution. He had heard the address of the defendant with deep regret, and with much disgust. He knew the court's anxiety not to deprive the defendant of the slightest circumstance of mitigation which his case afforded; he knew how long the court had refrained from interfering, upon the principle of mercy, to one who deserved none, although he would find it. It was impossible to hear the defendant's address without seeing that he entertained a deliberate design, manifested as well in the publi-

cation of the libel as in the defence of it, *per fas et nefas*, to ruin the character of Lord Castlereagh—to represent him as a monster of iniquity, and that against his own perfect knowledge of the fact. The Attorney General would not say this lightly of any man; but it was a matter of public history, that Lord Castlereagh held no office in Ireland till March, 1798; and yet it was asserted in the libel, that he was the leader of the administration, and the author of the measures which were pursued in 1797.* Was there any thing more disgraceful to that cause of liberty which the defendant pretended to hold so high, than that the outrage which the defendant had that day committed upon public decency and good manners, should be borne with impunity? Whom had the defendant not libelled, from his Lordship on the bench down to the Middlesex magistrates? The defendant desired his Lordship not to send him to any prison in custody of the magistrates of Middlesex, because that measure would be the death of him. Can any man think that he believes what he says? If he does believe it, he is as ignorant of the administration of the laws of England, as he has shewn himself of the laws. Had the defendant known any thing about that administration, he would have known that there was no one magistrate base or hardy enough to attempt his ill-treatment, or that if there were, the rest would never be found to consent to it. He would not, he said, trouble the court with repeating the libel; malignant and wicked as it was, there was nothing in it so malignant or so wicked as what the defendant had that day urged in its extenuation. Yes, he would repeat, so “wicked,” for there was no conduct more base than that of the man, who, when he was called upon to answer for wrongs, took advantage of the indulgence always shewn by the court to men in his situation, to more than double those wrongs, by charges ten thousand times more infamous than those for the preferment of which he was originally indicted. And who was the person who placed himself upon this eminence, with regard to Lord Castlereagh? By his own account of himself, he was the editor, in Ireland, of a paper called *The Press*; a man who was, in that country, convicted of a libel in that paper.

Mr. Finnerty rising at this moment,

Lord Ellenborough interfered, for the purpose of preventing the Attorney General from going into extraneous matter.

The Attorney General replied, that what he asserted was stated in the libel, and, after all that the defendant had said of

* What means this observation?—*Mr. Finnerty* did not state that Lord Castlereagh was the head of the Irish Government in 1797; and all the affidavits of torture referred to the months of May and June, 1798; when, according to the learned gentleman's own confession, the noble lord was actually minister of the country.

Lord Castlereagh, the learned counsel confessed that the court had a right to confine him to the letter of the libel. He desired it might be remembered, that almost every word the defendant uttered was the foulest slander that ever fell from the mouth of man. He called upon his Lordship to remember how he conducted himself towards his prosecutor, and how he (the Attorney General) conducted himself; and to deal justice between them. He had the defendant upon his own statement a convicted libeller in Ireland; and he had now shewn himself a libeller against the Court which then convicted him. Surely, when he planted himself in the late expedition, even the circumstance of his having been a convicted libeller would of itself suggest the propriety of not suffering such a person to accompany that expedition; and should an individual, because he chose to blow the trumpet of his own fame, dare to question the conduct of those who had the management of that expedition, when they thought fit to issue an order to prohibit his remaining in their company? and should it be permitted him, when called upon to answer for a libel, to multiply that libel, and to avow himself the accuser of Lord Castlereagh? Was there any thing in this conduct but the excess of it which stupified one, and prevented one from complaining of it at once? The learned gentleman would not be understood as complaining of the court for not interposing more severely; for, after his Lordship's notice, the defendant had nothing to prevent him in his calumnies but his own sense of decency. When he began a sentence, the court could not anticipate how it would end. But the Attorney General called upon the court to visit these added calumnies in the defendant's punishment. What redress had Lord Castlereagh for the gross injuries he had received that day; unless, taking all the circumstances into their consideration, the court estimated the degree of malignity which the defendant expressed against Lord Castlereagh, and punish him accordingly? The defendant had stated himself to have acted not without legal advice, but the learned gentleman was well persuaded the defendant had not followed that advice; for no gentleman at the bar would have advised the defendant to pursue the conduct he had that day pursued; and there was not one but would have told him that the very production of his present affidavits would be a violation of the law. His passion for injuring Lord Castlereagh had suppressed his natural desire of defending himself: he was in the situation of a man reckless of his own life, so that he murdered his enemy, or him whom he chose to fancy his enemy. The question for their Lordships to consider was the measure and kind of punishment which should be inflicted upon the defendant; and upon that head the defendant himself had desired their Lordships not to send him to a

particular species of prison. The Attorney General trusted the punishment of the defendant would not be confined to imprisonment; but, that if there was any kind of punishment in their Lordships' discretion more degrading than imprisonment, that too would be inflicted upon the defendant. If their Lordships had ever met with a case more aggravated than the present, he desired that the defendant might receive a mitigated sentence; but if they found in the affidavits and address of the defendant to the court, and to the public (the counsel might say), the utmost degree of malignity, he desired them not to forget the justice of the laws of England, tempered as they were with mercy; and also not to forget their Lordships' own dignity, and how the defendant had aimed his outrageous reflections upon those laws, through the court. He desired them to remember, too, the prosecutor's unmerited wrongs; and when they had allowed every thing to mercy, when they had studiously selected every portion of excuse for the defendant's conduct, to put his accumulated malignity into the other scale, and then pronounce the sentence which justice called for and exacted. How would character be sacred hereafter, if this offence were lightly punished? What case called for the severest punishment, if this did not?

Mr. Garrow followed on the same side.

Mr. Justice Grose then pronounced the judgment of the court in nearly the following terms:—"Peter Finnerty, You are to receive the sentence of this court, upon indictment charging you with having composed and published one of the most inflammatory libels against Lord Viscount Castlereagh, as one of His Majesty's principal Secretaries of State, that the envenomed pen of malice could put upon paper, in respect of a gentleman of his rank and situation in the country:—of this libel we must deem you to be the composer, for upon the indictment it is so charged, and by your suffering judgment to go by default, you have admitted the fact. Upon the precise nature of it I have had so lately occasion to comment when giving the judgment of the court on another offender, that I need only repeat, that that which was an offence in him, must be a still greater offence in you, the author; and whether we consider the steps taken by you, preparatory to the publication of this libel, or the malignant purpose of taking those steps, and sending it into the world, nothing can be devised much more studiously libellous, base, cruel, or malignant, than the offensive publication. As to mitigation, we in vain look for any thing like it; the whole of your conduct seems to shew you to have proceeded with a cool, deliberate intention to commit the crime charged upon you; and in what has passed this day, we are sorry to find

nothing like a sense of your offence, or any thing like contrition. I have stated that the whole of this subject has been lately before us, and is so fresh in our memory, that we have no difficulty in passing upon you, without further deliberation, the sentence of the law; and, accordingly, this court doth order and adjudge, that for this offence you be *imprisoned in His Majesty's Gaol in the county of Lincoln, for eighteen calendar months, and that, at the expiration of that time, you do give security for your good behaviour for five years, yourself in 500l. and two sureties in 250l. each; and that you be further imprisoned in the said Gaol till such security be given.* And that you be in the mean time committed to the custody of the Marshal of the Marshalsea in execution of your sentence."

In a few days after the sentence Mr. Finnerty was conveyed to Lincoln Castle.

The precedent in Draper's case, which was decided in November, 1808, having been so often referred to in the foregoing pages, it is thought proper to annex the following copy of Draper's affidavit, in order that the reader may be enabled to form some judgment upon the subject.

Some of the charges or "fresh libels" are marked in Italics, and the irrelevant matter with inverted commas.

IN THE KING'S BENCH.

The King against Edward Alured Draper, Esq.

EDWARD ALURED DRAPER, of Park-Street, Westminster, in the county of Middlesex, Lieutenant-Colonel in His Majesty's service, and Captain of a Company in the 3d regiment of Guards, maketh oath and saith, That William Fullarton, Esq. deceased, formerly Colonel of the late 23d regiment of Light Dragoons, in or about Trinity Term, 1806, brought an action in this honourable court against the deponent for publishing in the same book for which this deponent hath, since the said William Fullarton's death, been indicted, the following alledged libel,—“ I must now inform the public from authority beyond all question, that an official report was made by General, the Earl of Carhampton, commander in chief of His Majesty's forces in Ireland, respecting the unfaithful returns made by Mr. Fullarton, as colonel of a regiment under his lordship's command; that the original documents were transmitted to the Adjutant-general's office, Horse Guards, for the purpose of substantiating the charge; and with honest heartfelt satisfaction do I record it, to the eternal honour of our illustrious commander in chief, that a public official communication of the above-mentioned circumstances was

made by His Royal Highness to the Secretary of State's office,* previous to Mr. Fullarton's leaving England. On this last transaction, I shall not make a single comment." And this deponent saith, that he, in the vacation of the same term, pleaded Not Guilty, and also certain justifications, and thereby alledged in substance, that before the publication of the said book, and whilst the said William Fullarton was colonel of the said regiment, he had, as such colonel, made unfaithful returns by returning a greater number of troop horses as effective to the said regiment, than in truth and in fact were effective thereto, and that an official report or communication had been made by the Right Honourable the Earl of Carhampton, then commander in chief of His Majesty's forces in Ireland, to the Right Honourable Earl Camden, then Lord-Lieutenant thereof, concerning the said returns, and that before the communication in this deponent's said plea after-mentioned, certain claims and charges had been made, and were then subsisting against the said William Fullarton, as colonel of the said regiment, concerning the appointments, &c. furnished for the same whilst he was colonel thereof, and that afterwards His Royal Highness Frederick Duke of York, then commander in chief of His Majesty's forces, understanding that it was intended to employ the said William Fullarton in some public capacity in the West Indies, made an official communication thereof to the Right Honourable Lord Hobart, then one of His Majesty's principal secretaries of state, at his office, as such secretary. And this deponent further saith, that issue was joined in the said cause, and notice of trial was given this deponent's solicitor in the following Michaelmas Term, immediately upon receiving which, he, this deponent, applied to this court for commissioners to examine witnesses resident in Ireland and in Scotland, and obtained an order Nisi for that purpose; but the same was afterwards discharged by this court, on being opposed by counsel for the said William Fullarton, who then offered to produce at the trial of the said cause, all such persons as he, this deponent, should require from Scotland aforesaid, and also to admit, as original, copies of all the various letters, returns, and other documents, which this deponent conceived necessary to support the said justifications, which were deposited in different public military offices in Ireland. And this deponent further saith, that by the advice of his counsel he declined the said offer relative to the production of the persons resident in Scotland, and directed his solicitor to enter into the admissions proposed by the counsel of the said William Fullarton, as aforesaid. And this deponent thereupon presented a memorial, praying that the said letters, returns, and other documents, might be transmitted from Ireland to the Horse Guards, for the purpose of enabling both parties to procure authenticated copies, the prayer of which memorial was complied with, and the said letters, returns, and other documents, were accordingly transmitted to the Horse Guards, in or about the month of January, 1807, shortly after which the said William Fullarton declined entering into any admissions whatever, and in consequence thereof the said papers were re-

* Contradicted by the affidavit of the Earl of Buckinghamshire.

turned to the different offices from whence they were originally taken, and this deponent was compelled to file a bill in His Majesty's court of Exchequer, to obtain commission for the examination of witnesses in Ireland and Scotland. And this deponent further saith, that the said William Fullarton, having put in his answer, the said court ordered the commission, although the issuing thereof was again opposed by the counsel of the said William Fullarton. And this deponent further saith, that although the said court ordered such commissions to be issued in the month of February, 1807, it was not until the month of May following that he, this deponent's solicitor, obtained from the said William Fullarton's solicitor, the names of the commissioners to be inserted on his behalf, as he, this deponent, hath been informed and believes. And this deponent further saith, that in the month of June, 1807, certain admissions were entered into for the production of certified copies required to be produced by the said William Fullarton and by this deponent, of the letters, returns, and other documents herein-before alluded to, and more particularly specified in the schedules to the said admissions annexed, and by the same admissions it was also stipulated, that such copies should be entitled to the same degree of credit as the originals themselves, if produced, would have been entitled to. And this deponent further saith, that in Michaelmas Term, 1807, the said William Fullarton applied to the said court of Exchequer, to dissolve the injunction issued by the said court, on the ground that no proceedings had been had under the said commissions, which the said court refused to dissolve, this deponent and his solicitor having made affidavit (as the fact was) that if any delay had taken place, they were unacquainted with the reason, and his solicitor also deposing, that no application whatever, either directly or indirectly, had ever been made to him, complaining of any delay having taken place, and on this deponent's also deposing (as the fact was) that he then was and always has been, anxious for the trial of the said action. And this deponent further saith, that the commission issued into Scotland, with the proceedings taken thereunder, was executed and returned to this country, and filed on or about the 30th day of December last, and the commission issued into Ireland, with the proceedings taken thereunder, was also executed and returned to this country, and filed on or about the first day of February last. And this deponent further saith, that the said William Fullarton having, as this deponent was informed and believed, and still verily believes, pending the said commissions, and shortly after they were issued, and before any evidence was had or taken thereunder, viz. on or about the 24th of June, 1807, caused a private examination before the sheriff of Ayr, or his substitute, to be had and taken of every person whom it was probable this deponent would examine in Scotland,* and taken away with him the said examinations and every paper relative thereto, and having also addressed a letter to one of the commissioners, and furnished papers *exparte* to the

* Contradicted by the affidavit of the sheriff of Ayr.

other commissioners, to whom commission was directed, tending to prejudice this deponent, and also to prevent the due execution of such commission, this deponent caused application to be made to the said court of Exchequer, to commit the said William Fullarton, for contempt; and the barons of the said Exchequer court were pleased, on the 29th day of January last, to make an order in the said cause, that the deponent should shew cause to that court, on the morrow-week, why he should not stand committed to the custody of the warden of His Majesty's prison of the Fleet, for his contempt. And this deponent further saith, that on the 10th day of February following, cause was shewn against making the said order absolute by several counsel on behalf of the said William Fullarton, and one of this deponent's counsel was heard in support thereof, when the said court adjourned the final hearing until a subsequent day; but before the said motion was further proceeded in, and before the Equity Sittings of the said court after Hilary Term had commenced, viz. on or about the 13th day of the said month of February, he, the said William Fullarton, departed this life, and the present indictment was preferred against this deponent on or about the 30th day of May last. And this deponent, in regard to the said passage or supposed charge against the said William Fullarton, of making unfaithful returns as Colonel of the said late 23d regiment of Dragoons, maketh oath and saith, that he hath heard and believes that the said Earl of Carhampton, on or about the 30th of June, 1797, he being then commander in chief of the forces in Ireland, addressed a letter to Major Maxwell, then of the said regiment, at Spring Hill, Ayr, in Scotland, containing the words following:—"You will please to order over all your recruits, recruiting parties, and horses, and you will likewise join your regiment with all expedition." And this deponent further saith, that it appears by the monthly return of the said regiment, dated the 1st day of September, 1797, that the said Major Maxwell, together with thirty-one men and sixty horses, had joined the said regiment prior to that day. And this deponent further saith, that in the said monthly return of the strength of the said regiment, which is signed by the said William Fullarton, three hundred and fifty-three horses are returned in the body or front thereof as effective to government, when, on inspecting the muster-roll for the same period, which ought to correspond with the commanding officer's return, if true, it appears, and this deponent therefore verily believes the fact to have been, that three hundred and forty-two horses only were effective for that time as deponent computes the same. And it further appears, by the correspondence hereinafter set forth, that three hundred and fifty-three horses so returned as effective to government, fourteen were then in Scotland, or were represented by the said William Fullarton to William Spencer, the lieutenant-colonel of the said regiment, to be so, and accordingly returned by him at the command of the said William Fullarton. And this deponent further saith, that although in the body or front of the before-mentioned return so made and signed by the said William Fullarton, three hundred and fifty-three horses

and three hundred and sixty-four men are returned as effective to the said regiment, yet, in the detail written on the back of the said return, the total number of men as added together, is only three hundred and fifty-five, being nine less than are returned in the body of it, and the total number of horses added together, is stated at three hundred and forty-six, being seven less than are returned in the body of it, and although three hundred and forty-six is put down as the result of the casting up of the horses at the different quarters, as specified on the said detail, yet this deponent saith, the said return is unfaithful in this respect also, that the different number of horses detailed do not, on being truly cast up, amount to three hundred and forty-six, as the said detail purports, but to three hundred and twenty-six and no more, being twenty-seven less than stated in the body of the said return. And this deponent further saith, that in another part of the said return, and after a flourish by the pen, indicating a final end thereto, is written as follows: "N.B. I — serjeant, two rank and file, and fourteen horses, returned on command on the face of the return, were left behind in Scotland." And this deponent further saith, that he believes the said N.B. was added in consequence of subsequent orders from the adjutant-general of His Majesty's forces in Ireland, transmitted to the commanding officer of the said regiment of Dragoons. And this deponent further saith, he hath heard and believes that some time during the period while he, the said William Fullarton, was colonel of the said regiment, that he, the said William Fullarton, together with Mrs. Fullarton, his wife, called in their carriage, drawn by four horses, on Richard Oswald, Esq. then and now residing at Auchincruive, in Scotland, and that the said William Fullarton, on that occasion, desired the said Richard Oswald, to look at the two leaders, which the said William Fullarton then remarked to him, government paid for, as they were borne on the strength of the said regiment.* And this deponent further saith, that it does not appear from the subsequent returns of the said regiment, that any horses or men joined the said regiment from Scotland, after the said 1st day of September, 1798, until after the 1st day of October, 1798, as in the return dated that day are the following words:—"Not joined from Scotland since 1st September, 1797, 13." And this deponent further saith, that, by permission from the heads of the different military departments in Ireland, he hath searched for any correspondence that might have taken place on the subject of the said horses. And this deponent on such search discovered a letter, written to Colonel Handfield, then military secretary to the said Earl Carhampton, by the said Lieutenant-Colonel Spencer, of the said regiment, dated the 31st day of October, 1797, of which the following is a copy, so far as relates to the said troop horses:—"Sir, Fourteen recruit horses of the 23d Dragoons being left in Scotland, which from different causes were not able to march with the others that joined the regiment some time ago, and the regiment being greatly in want of horses, I wish

* Contradicted by the affidavit of Mrs. Fullarton.

to be permitted the honour of submitting to the commander in chief, whether an intelligent officer had not better be sent to Scotland, and report to the regiment the actual state of the horses, in order that a party may be sent to bring such of them as are fit for service and able to travel, if any such there are. I beg leave to repeat, that the 23d Dragoons, from the dreadful havoc made in the regiment by the glanders, and from other causes, are very much dismounted, and a number of fine men rendered non-effective from the want of horses, arms, and other necessary appointments." And this deponent further saith, that the said Colonel Handfield, (on the 2d day of the following month, replied as follows:—"Sir, I have laid before the commander in chief your letter of the 31st ult. proposing to send to Scotland an intelligent officer to report the actual state of fourteen recruit horses, which from different causes were not able to march with the others that joined the regiment sometime ago; and I am commanded by his lordship, in reply, to desire you will be pleased to report the particular reasons assigned to you, why each horse did not march with the others to join the regiment, where and in whose care they are now left, when and by whom purchased, and stating fully, for his lordship's information, every particular respecting them that has come to your knowledge." And this deponent further saith, that on the 5th day of the same month of November, Lieutenant-Colonel Spencer returned the following answer to Colonel Handfield, (that is to say:)—"Sir, In reply to your letter of the 2d instant, containing the orders of the commander in chief, that I report the particular reasons assigned to me why each horse of the 23d Dragoons of those left behind, of the horses recruited in Scotland, did not march with the others to join the regiment, where and in whose care they are now left, when and by whom purchased, &c.—I have the honour to state, that these horses being recruited by Colonel Fullarton, and presumed to be in his possession, no particular report of them has ever been made to me, nor am I enabled to give any information to Lord Carhampton respecting them; they were returned to the regiment by Colonel Fullarton's command, and I considered it my duty to return them to government." And this deponent further saith, that on the said 8th day of the said month of November, Colonel Handfield made the following reply to Lieutenant-Colonel Spencer, (that is to say:)—"I have laid before the commander in chief your letter of the 5th, in answer to mine of the 2d instant, and I am commanded by his lordship to acquaint you, that he considers the officer in command of the regiment at quarters as responsible to him; that Colonel Fullarton having been lately with the regiment, every necessary information respecting those fourteen recruit horses should have been procured from him; his lordship therefore desires you will obtain full information on this subject, and transmit to be laid before the commander in chief, special answers to the several queries I had the honour to state to you by his lordship's command, in my letter of the 2d instant." And this deponent further saith, that Lieutenant-Colonel Spencer, on the 11th day of the same month, returned the following answer to the said letter, (that is

to say):—"I have the honour of your letter of the 8th instant, which states, that the commander in chief considers the commanding officer in quarters responsible to his lordship; that Colonel Fullarton having been lately with the regiment, every necessary information respecting the fourteen horses left in Scotland, should have been procured from him. In reply to the above, I humbly beg leave to observe, that I did make every inquiry with respect to the horses in question, not that I considered any responsibility as attaching to me, the horses being recruited by the colonel of the regiment in another kingdom and still there; but from a wish to be informed as far as I was able of every matter and circumstance relative to the regiment, Colonel Fullarton having come immediately from London to Dublin did not appear to be well instructed in the matter himself, and I had no other source whence to give information. The horses were recruited by Colonel Fullarton, or received by him as drafts, and are at the Colonel's house in Scotland, under the care of his agent and a dragoon of the regiment; the period of being recruited has been given in with the recruiting accounts to the agents by Colonel Fullarton. Why each horse did not march with the others the colonel must point out; but of their present state and ability to join the regiment, or the contrary, would, with the humblest submission, I presume, be best ascertained by sending an officer to Scotland to inspect them. (Colonel Fullarton being in London or its immediate neighbourhood,) as I have already had the honour to submit to the commander in chief." And this deponent further saith, that the several extracts and copies herein before set forth, except the said letter, dated the 31st day of October, have been carefully compared by this deponent with certified copies thereof, under the hands of the commissioners nominated by and on the behalf of this deponent, and by them transmitted to this deponent's agent, and now in his possession, and are part of the documents agreed to be admitted authentic as aforesaid. And this deponent further saith, that while he was in Ireland he inspected the forage accounts of the said regiment, in order to ascertain to whom the forage money for the fourteen horses stated to be in Scotland had been paid, that he, this deponent, might with the greater certainty direct the necessary inquiries to be made in that kingdom. And this deponent further saith, that among the vouchers passed and allowed for forage, he, this deponent, discovered a receipt, of which the following is a copy, (that is to say,) "Received from the Paymaster of the 23d Dragoons, the sum of £300. 15s. 7½d. in full, for horses at forage, by Colonel Fullarton, in Scotland. Ayr, 16th of July, 1798. John Bruce."* And this deponent hath heard and believes that the said receipt was like wise transmitted to this deponent's agent, and an authentic copy was by such agent delivered over to the solicitor of the said William Fullarton. And this deponent further saith, that it appears from the forage vouchers of the

* The paymaster of the 23d Dragoons, at the time this receipt purports to bear date, deposed in his affidavit, that he never knew of any such payment—and further, it was deposed by others that this forage money was still due.

said regiment, that the amount of the said receipt has been passed to the credit of the said regiment; and therefore this deponent believes the same hath been allowed to the said William Fullarton, and this deponent, from the strict inquiries he directed to be made from the various information he hath collected from persons well acquainted with Ayr and its vicinity, and with the foraging of horses in Scotland for the said regiment, *he verily believes that no person of the name of John Bruce was ever employed by the said William Fullarton, or otherwise to supply forage for any horses belonging to the said 23d regiment of Dragoons, that no such payment was in fact made, but that the said receipt is a fabrication, and an imposition upon the government of the country.* And this deponent further saith, that he hath repeatedly been informed by Sir Samuel Hood, K.B. and one of the commissioners for the island of Trinidad, in the said indictment mentioned at the time therein set forth, and verily believes that the charge against Colonel Thomas Picton, in the said indictment mentioned, was brought against him by the said William Fullarton, entirely contrary to the opinion and belief of the said Sir Samuel Hood. And this deponent further saith, that the affidavit hereunto annexed was sworn by Sir Samuel Hood for the purpose of producing to this honourable court when this deponent attended to receive the judgment, though on a prosecution against him by the Right Honourable John Sullivan for another passage in the same book, and it would have been produced accordingly, but that it did not come to hand early enough for that occasion, and that the absence of the said Sir Samuel Hood from this country alone deprives this deponent of the testimony of the said Sir Samuel Hood, of the correct truth of many of the material facts stated in the passages for which this deponent is now indicted, and to the correctness of which facts the said Sir Samuel Hood hath frequently expressed to this deponent his willingness to bear testimony in the most solemn and unequivocal manner. And in particular, he, this deponent, hath been informed by Sir Samuel Hood, and he verily believes that when an attempt was made by the said William Fullarton to examine into the previous government of the said island the same was publicly, forcibly, and with the utmost earnestness on the part of the said Sir Samuel Hood not only deprecated, but the veracity of the said William Fullarton, in other concerns, was impeached and maintained before His Majesty's council of the island of Trinidad, and that such impeachment was supported and sustained by all the members of that council but one; and this deponent further saith, that he hath likewise been informed by the said Sir Samuel Hood, and verily believes that the said Sir Samuel Hood, in the presence of the council of the said island, addressed the said William Fullarton in the words, or to the effect set forth in fol. 52 and 53 of the publication, for part of which this deponent is indicted; and this deponent further saith, that from his, this deponent's knowledge of the said William Fullarton, and from the observations he had an opportunity of making personally, as military secretary to the late General Greenfield, and from the information this deponent has received from the said general, and the said

Sir Samuel Hood, and from various other honourable and respectable persons, this deponent verily believes, that *the motives which actuated the said William Fullarton in the prosecution alluded to by the said indictment, were not the result of a feeling, or sense of a public duty, but proceeded from motives of private revenge or resentment.* And this deponent further saith, that in the depositions returned to the mandamus alluded to in the said book and indictment, the principal inhabitants of the said island did bear testimony to the honourable and upright conduct of the said Thomas Picton, as stated in this deponent's publication, from fol. 187 to 198 inclusive; and that the said William Fullarton, in a book published by him respecting the affairs of Trinidad, under the title of "A Refutation of the Pamphlet which Colonel Picton lately addressed to Lord Hobart," speaking of this deponent, makes use of the following words, "I shall not be deterred by any insolence of Major Draper, nor from any of the confederated band leagued and colleagued to support the turpitudes of that cruel and vindictive governor." And this deponent saith, that he humbly conceives that those parts of the return to the said mandamus, which are set forth in page 161 and several subsequent pages of this deponent's said publication, authorize a conclusion that "the Catholic curate of the parish in which Louisa Calderon, in the said indictment named was born, furnished Pedro Vargas and Iwan Montes with fabricated certificates of her baptism and age. And this deponent hath heard and believes that the said curate, in consequence thereof, was afterwards sent to prison at the instance of the vicar general of the said island. And he hath heard and believes that the said Louisa Calderon was taken by Mrs. Fullarton in her carriage, and introduced by her to some of her female acquaintance in Scotland, and he has no doubt either of the authenticity of the letter set forth in fol. 184 of this deponent's publication, or of the truth of its contents, except that the word Argyleshire has by a mistake been printed instead of Ayrshire: and this deponent further saith, that he was present at the trial of the said Thomas Picton, which preceded this deponent's publication, and that the principal witnesses produced by the said William Fullarton, in support of the prosecution aforesaid, besides the said Louisa Calderon, were the said Iwan Montes and the said Pedro Vargas: and that in page 209, and in several following pages of the said publication, are correct copies of extracts from depositions made concerning the said Iwan Montes, and returned to the said mandamus of the private examination of witnesses at Trinidad, in the presence of the said William Fullarton himself; and this deponent saith that, on the day following that on which process was issued against this deponent in the said action, at the suit of the said William Fullarton, another process was also issued by the then attorney of the said William Fullarton, against this deponent, at the suit of the said Iwan Montes of being a bad and useless pioneer, or deserter, from the Havannah, and very generally believed in Trinidad to be a spy to the Spanish government. And this deponent further saith, that the said Iwan Montes having declared in such

action, this deponent pleaded a justification thereto, and a commission was issued and executed at the island of Trinidad, in such last-mentioned action; and the said commission having been returned to this country in the month of August, 1807, this deponent, in the following term, caused such action to be non-suited, but hath been unable to obtain any costs from the said Iwan Montes, who has quitted this kingdom for Trinidad. And this deponent hath seen a letter from the attorney-general of the said island, the contents of which he verily believes to be true, wherein the said attorney-general writes, that *the said Iwan Montes had stated that he was extremely sorry for the part he had so taken, and that he had been pushed on to act as he did by the said William Fullarton.* And this deponent believes that the governor of Trinidad aforesaid refused the said Iwan Montes the liberty of residing there unless he produced bondsmen to be answerable for his good behaviour; and that bond had been given accordingly." And this deponent further saith, that the written evidence and documents referred to in pages 245 and 246 of the said publication, are all genuine and correct; and deponent further saith, that the said William Fullarton, from time to time, as well before as pending the before-mentioned prosecution of the said Thomas Picton, printed and published, and employed others to print and publish, various tracts and pamphlets, and books reflecting in the grossest manner on the conduct of the said Thomas Picton, the said Sir Samuel Hood, the said General Grinfield, this deponent, and various other persons who from their own local knowledge of facts, were enabled to contradict the false assertions of the said William Fullarton; and this deponent further saith, that the said William Fullarton having in one of his said publications, which he forwarded, as this deponent verily believes, to most of the members of His Majesty's most honourable privy council, and to other persons, whilst his charges against the said Thomas Picton were under consideration, asserting that he never had any conversation with the said General Grinfield, to the prejudice of the said Thomas Picton, relative to the affairs and government of Trinidad; but that he had purposely avoided saying any thing to General Grinfield that might rouse him against the said Thomas Picton, he, this deponent, addressed a letter to the said Thomas Picton, in which this deponent, after quoting the above extract from the said publication, wrote as follows: "I cannot but suppose that he has purposely forgotten a long private conference which took place between General Grinfield and himself, on his arrival at Barbadoes from England; and from the subsequent and immediate declaration of General Grinfield, that on apprehending a disagreement between Colonel Fullarton and Brigadier General Picton, he would take care to steer clear of all disputes not military, it is natural to infer that arguments had not been wanting to prepossess General Grinfield with an unfavourable opinion of your conduct and actions." And this deponent further saith, that the said General Grinfield had in point of fact a long private conference with the said William Fullarton at Barbadoes, prior to the said William Fullarton's arrival at Trinidad; and that immediately after such conference, the

said General Grinfield did address himself to this deponent in the words, or to the effect above set forth; and this deponent further saith, that the said General Grinfield, on his arrival at Trinidad, took up his residence at the government house, occupied by the said Wm. Fullarton as first commissioner; and after remaining there a week, quitted the same and went to a public hotel, in consequence of frequent interruptions of official business, and a disposition on the part of the said William Fullarton to enter argumentatively into the circumstances of the quarrel between himself and the said Thomas Picton, as the said General Grinfield informed this deponent, and as he, this deponent, verily believes, and this deponent wrote and sent the said letter to the said Thomas Picton as a friend, and without any idea that the same would ever be printed; but the same was afterwards published by the said Thomas Picton with this deponent's assent; and this deponent saith, that in a subsequent quarto publication by the said William Fullarton, published before this deponent's said publication, he, the said William Fullarton, (amongst other things,) speaking of the said letter, states as follows: "Before I conclude my remarks on this part of the misrepresentation brought forward by Colonel Picton, I must add some animadversions in the declarations of Major Draper and on the position which he had the insolence to assert that I have not truly represented facts, but that such ill-grounded assertions are adduced as must subject the writer to the heavy charge of a breach of veracity. In ordinary cases the only answer to such remarks would be, to make the Major eat up his words, or else to cram them down his throat with the point of my sword." And this deponent further saith, *he hath heard and believes that some time in or about the year 1802, the then commander in chief of His Majesty's forces in Ireland, officially transmitted to Field Marshal, His Royal Highness the Duke of York, petitions from William Spencer of Belfast, boot-maker, and Michael Morris of Tuam, saddler, respectively complaining that the said William Fullarton was very considerably indebted to them for saddlery and boots furnished the said regiment, and that they were unable to procure payment thereof.* And this deponent further saith, that he hath also heard and believes that a memorial was also presented by the said William Spencer to the said Duke of York, complaining of the conduct of the said William Fullarton in not discharging the demand of the said William Spencer, amounting to 1000*l.* or thereabouts, and praying His Royal Highness's interference for the recovery thereof. And this deponent further saith, that after His Royal Highness had made minute inquiries into the facts contained in the said memorials, he did, as this deponent hath heard and believes, on the 15th day of June, 1802, make an official communication thereon, to the Right Honourable Lord Hobart, the secretary of state for the colonial department, of which His Royal Highness permitted this deponent to take a copy, and which is in the words following (that is to say):—"My lord, understanding that it is intended to employ Colonel Fullarton in some public capacity in the West Indies, my duty obliges me to acquaint your lordship that there are such serious claims against Colonel Fullarton, by the

persons furnishing clothing and appointments to the 23d regiment of Light Dragoons, for payment of their demands; that I have to point out to your lordship the expediency of Colonel Fullarton not being allowed to proceed on the intended service until he shall have settled the demands against him, to the satisfaction of the Irish government and the secretary at war.

“FREDERICK.”*

And this deponent saith it appears by the certificates of the auditor general of Ireland, authenticated as aforesaid, dated in January last, that there then remained due from the said regiment, to government, on balance of forage accounts, upwards of 2000l. And lastly, this deponent saith, that no copy of this deponent's said publication hath been sold by his direction, or privily, since the information herein before mentioned, was filed against him.

EDWARD ALURED DRAPER.

Sworn in Court, this 16th
day of November, 1808.

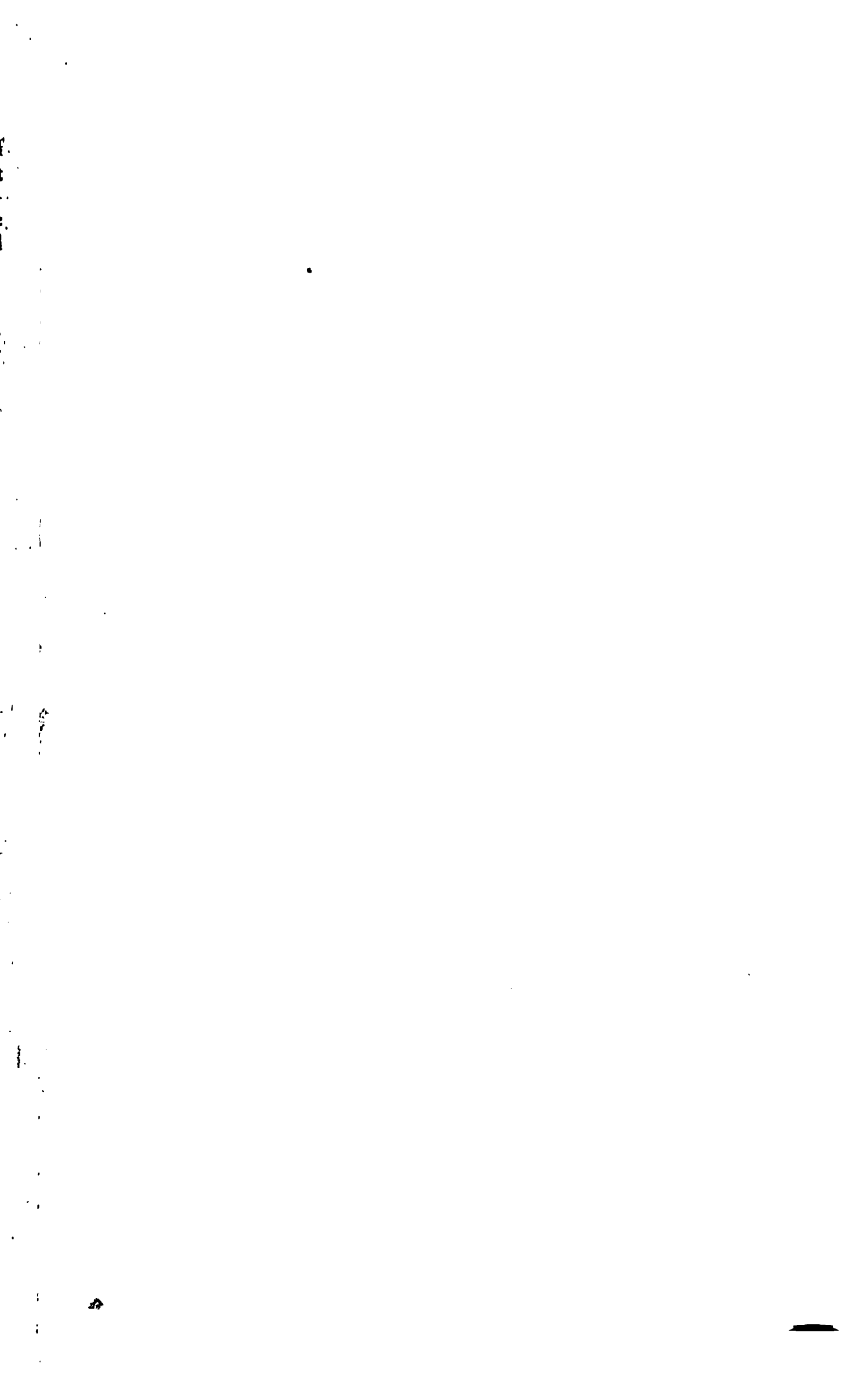
By the Court,
EDWARD ALURED DRAPER.

Re-sworn in Court, this 21st
day of November, 1808.

By the Court.

From a review of this affidavit, and still more from a review of the whole of this case of Draper's, which was published by all the booksellers, the reader will be able to judge whether Mr. Finnerty was justified in his reference to the precedent. Colonel Draper, it will be seen, was allowed to introduce a variety of irrelevant matter. He brought forward all the grounds of irritation he could state, on the part of his prosecutor, in order to justify his libel.—He was not interrupted in his new charges or “fresh libels” upon Colonel Fullarton, some of which charges were, by the way, not at all adduced in the corroboration of any allegation contained in the libel for which he was prosecuted. Yet Colonel Draper's affidavit was read, and placed upon the file of the court, and after Mr. Garrow and Mr. Nolan had urged every argument in their power in aggravation, the result was simply this, by the judgment of the court, that Draper was held to bail. Such was the decision in the case of Colonel Draper of the Guards, who abused Colonel Fullarton for prosecuting General Picton for the infliction of torture. How different is the fate of Mr. Finnerty!

* This charge it appears from the affidavit of Lord Buckinghamshire was investigated, and the result being quite satisfactory, Colonel Fullarton proceeded to Trinidad.



~~Abstract~~
Case of Peter Finnerly, Includ
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